Supreme Court, U.S.
FILED

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No.

IN THE
Supreme Court of the United States

LOIS E. ADAMS, *ET AL.*,

Petitioners,

v.

GEORGE W. BUSH, *ET AL.*

Respondents

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

After a three-judge district court decides a motion under Federal Rule of Civil Procedure 60(b)(4) & (6) for relief from judgment, which motion doesn't seek an injunction, nor does decision on that motion entail granting or denying an injunction, and/or which motion doesn't require decision on the constitutional question(s) which lodged the case before the district court of three judges in the first place, query:

I: Whether an appeal from a decision of a three-judge district court on a motion for relief from judgment under Federal Rule of Civil Procedure 60(b) is properly taken to a court of appeals under 28 U.S.C. § 1291 or is properly taken directly to this Court under 28 U.S.C. § 1253.

II: Whether a court of appeals should transfer an appeal from a decision of a three-judge district court on a motion for relief from judgment under Federal Rule of Civil Procedure 60(b) to this Court under 28 U.S.C. § 1631, if this Court has sole jurisdiction over such an appeal under 28 U.S.C. § 1253 and if the appeal was filed in the court of appeals in good faith reliance on this Court's prior opinions construing 28 U.S.C. § 1253.

PARTIES TO THE PROCEEDING

Petitioners (Plaintiffs then Appellants below) are Lois E. Adams, the Rev. Mr. Floyd H. Agostinelli, Acie L. Byrd, Jr., Lawrence Alston Gray, the Rev. Graylan Scott Hagler, Lawrence Benjamin Harris, Wimberly Higgs, Bette J. Hoover, Anise Jenkins, Rahim Jenkins, Marilyn Killingham, Dujuan Ricardo Malachi, Lamont B. Mitchell, Loree H. Murray, the Rev. Anita O'Brien, Sam Smith, and Malcolm L. Wiseman, Jr.. All Petitioners are private individuals; none is a non-governmental corporation.

Respondents (Defendants then Appellees below) are George W. Bush acting in his official capacity as the President of the United States,* Jeff Trandahl acting in his official capacity as the Clerk of the United States House of Representatives,** and Wilson Livingood acting in his official capacity as the Sergeant at Arms of the United States House of Representatives.

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* William Jefferson Clinton was the President when the Complaint was filed (*see* App. E), but he was succeeded in office by Mr. Bush in February of 2001, so Mr. Bush succeeded to his place in the case under Federal Rule of Civil Procedure 25(d)(1) and/or Federal Rule of Appellate Procedure 43(c)(2).

** Robin H. Carle was the Clerk of the House when the Complaint was filed (*see* App. E), but she was succeeded in office by Mr. Trandahl in January of 1999, so Mr. Trandahl succeeded to her place in the case under Federal Rule of Civil Procedure 25(d)(1).

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OPINIONS BELOW

The order of the U.S. Court of Appeals for the D.C. Circuit (from which this *Petition* ensued) wasn't reported, but is reproduced as Appendix ("App.") A. The order of that court on Petitioners' motion to reconsider the first order wasn't reported, but is reproduced as App. C. The order of the three-judge district court (from which the original appeal was taken) wasn't reported, but is reproduced as App. B.

BASIS OF JURISDICTION

On October 18, 2001, the United States Court of Appeals for the District of Columbia Circuit entered an Order dismissing Petitioners' appeal (number 01-5132); on January 10, 2002, the same Court entered an Order denying Petitioners' motion for rehearing and rehearing en banc. Thus, this Court has jurisdiction over the instant Petition for Writ of Certiorari under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AT ISSUE

The questions before the Court involve the jurisdictional statutes 28 U.S.C. § 1291 and 28 U.S.C. § 1253, which are reproduced in App. D. The questions may also involve 28 U.S.C. § 2284(a), which is also reproduced in App. D.

STATEMENT OF THE CASE

This case ("*Adams*") was originally filed on June 30, 1988 (*see* App. E) to challenge the fact that Congress treats the residents of the District of Columbia differently than it has treated all other people over whom Congress now has or has had *identical* powers under the Constitution. One prominent instance of this differential treatment is in apportionments of congressional districts. Though *all* people who reside or have resided in places over which Congress now has or ever had the power of "exclusive Legislation" under the Constitution (Art. I, § 8, Cl. 17, or specifically identical powers) were once *excluded* from apportionments of congressional districts, Congress has changed the status of all people who reside in places *other than* the present District of Columbia, such that

all those people are now *included* in such apportionments, while only the residents of the District of Columbia remain *excluded* from such apportionments. This differential treatment is under the sole control of Congress and this Court has acknowledged and affirmed Congress' alteration of the status of millions of people in one sub-group of the preferred class (those who reside in places commonly called "federal enclaves") in the cases of *Evans v. Comman*, 398 U.S. 419, 421-25 (1970), *affirming Comman v. Dawson*, 295 F.Supp. 654, 656-58 (D.Md. 1969), and *Howard v. Comm'rs of Sinking Fund*, 344 U.S. 624 (1953), *affirming* 248 S.W. 340, 342 (Ky. 1952). Defendants presented no evidence refuting or impugning these facts.[1]

Adams contends that the Congress of the United States, acting by and through the President of the United States, the Clerk of the House of Representatives, and the Sergeant at Arms of the House of Representatives (the agents charged by Congress to calculate apportionments of congressional districts according to congressional directions, report those apportionments to the states, then enroll and admit Representatives pursuant to those apportionments) infringe Plaintiffs' rights to the equal protection of the laws and to republican forms of governments under the Constitution (*see* App. E at 5–21). Since *Adams* was an action to redress the deprivation of rights and privileges secured to the Plaintiffs by the fourth Clause of the Fifth Amendment (the Due Process Clause, incorporating equal protection guarantees) and by the first Clause of the Fourth Section of the Fourth Article (the Guarantee Clause) of the Constitution of the United States and since Plaintiffs requested declaratory judgements and injunctions, the U.S. District Court for the District of Columbia had jurisdiction over the case under 28 U.S.C. §§ 1331, 1343(a)(3), 2201, and 2202. Jurisdiction in the district court was never questioned.

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[1] *Adams* also challenged the constitutionality of apportionments under the Guarantee Clause of the Constitution, Art. IV, § 4, but this is not discussed here, in the interests of brevity.

Among other relief, Plaintiffs demanded declaratory judgements (*see* App. E at 22–24) and injunctions that no calculations, reports, or ensuing actions part and parcel of apportionments of congressional districts be undertaken or enforced, which *include* all people now or ever under Congress' power of "exclusive Legislation" yet *exclude* the residents of the District of Columbia (*see* App. E at 25–27). Also, since *Adams* raised a challenge to the constitutionality of the apportionment of congressional districts, Plaintiffs requested the convening of a district court of three judges under 28 U.S.C. § 2284(a). This request was granted on November 6, 1988 (*see* App. F).

Several months after Plaintiffs filed their suit, an unrelated group of plaintiffs filed a separate suit styled *Alexander v. Daley*. *Alexander* was based on legal arguments and claims which are antithetical to those in *Adams*; it presented demands for remedies, moreover, which would have constituted further violations of the rights asserted in *Adams*. Over *Adams*' Plaintiffs' objections, the single judge to whom the case had originally been assigned consolidated *Alexander* with *Adams* just prior to granting *Adams*' request to set the case before a district court of three judges.

Separate motions for summary judgment were filed by plaintiffs in each case and separate motions to dismiss were filed by each defendant in each case. All dispositive motions were heard in oral argument on April 19, 1999.[2] Eleven months later, on March 20, 2000, the Three-judge District Court issued its judgment (reproduced in Apps. G & H).[3]

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[2] Shortly after oral argument, plaintiffs' counsel learned that the district court's docket for *Adams* included a number of errors and the court record ("jacket") did not contain certain crucial documents filed by Plaintiffs (such as plaintiffs' Memorandum in Support of Summary Judgment). Plaintiffs' counsel asked the Clerk of the court then the court itself to address the matter, but nothing came of the requests. The last time the jacket in this case was reviewed physically, it remained incomplete.

[3] The dissenting opinion of Judge Oberdorfer (published at 90 F.Supp.2d 72-107) is not reproduced in the appendix, since it is not

As relevant to the appeal underlying this Petition, the three-judge district court dismissed *Adams*' claims challenging apportionment of congressional districts (which, of course, amounted to denial of Plaintiffs' requests for injunctions) (*see* App. H at 1). Plaintiffs filed an appeal from the three-judge district court's judgment to this Court pursuant to 28 U.S.C. § 1253 (No. 00-97).[4] On appeal, this Court affirmed the decision of the three-judge district court (Oct. 16, 2000) and denied Plaintiffs' motion to rehear its earlier affirmance (Dec. 4, 2000).

Following these events and after a careful review of the opinion of the three-judge district court, Plaintiffs returned to the district court on February 28, 2001 to file a motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)(4) & (6).[5] Plaintiffs' motion (App. I) contended that the district court had improperly *merged Adams* into *Alexander*, such that the court lost sight of *Adams* as a distinct and entirely separate case from *Alexander*, that the district court had decided the claims and arguments presented in *Alexander* but had ignored the actual claims, arguments, and evidence presented in *Adams* (neither of which points were refuted by the Defendants), and that dismissal of *Adams*' claims by the three-judge district court *on the sole and exclusive basis of* the court's analysis of antithetical and antagonistic claims and arguments presented

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pertinent in any way to the issues raised in this Petition.

[4] Despite the fact that the court's Memorandum Opinion did not deal with *Adams*' claims, arguments, or evidence, but was solely devoted to *Alexander*'s claims and arguments, plaintiffs did not ask the three-judge district court for new trial or to alter or amend its judgment under Fed. R. Civ. P. 59 because it was not clear that the situation was germane to the grounds for such motions and there was reason to believe that the attempt would be pointless.

[5] Rule 60(b) provides (in pertinent part) that, "[o]n motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void; . . . or (6) any other reason justifying relief from the operation of the judgment."

in *Alexander* amounted to denial of due process of law to Plaintiffs in *Adams*. In essence, *Adams*' claims were dismissed because *Alexander*'s claims were deficient.

Plaintiffs did not request any injunction in their Rule 60(b) motion, nor was one even discussed, and decision on the motion did not require decision on the *merits* of *Adams*' challenge to the constitutionality of congressional districts. Further, no hearing was held on Petitioners' Rule 60(b) motion. On April 4, 2001, the district court denied Plaintiffs' motion (*see* App. B).

Since the decision entered on Plaintiffs' Rule 60(b) motion did not meet the overt criteria for direct appeal to this Court under 28 U.S.C. § 1253 and under a good faith reading of all relevant opinions of this Court and the courts of appeals construing Section 1253, Plaintiffs appealed to the U.S. Court of Appeals for the D.C. Circuit under 28 U.S.C. § 1291. But on October 18, 2001, the Court of Appeals dismissed Plaintiffs' appeal from denial of Plaintiffs' Rule 60(b) motion (App. A), saying (in pertinent part), that the appeal was "dismissed for lack of jurisdiction. This appeal from the three-judge district court's denial of relief from judgment under Federal Rule of Civil Procedure 60(b) is not properly taken to this court. See 28 U.S.C. § 1253, 2284(a)." Plaintiffs filed a motion to reconsider and reconsider en banc, also requesting that the court of appeals transfer the appeal to this Court under 28 U.S.C. § 1631, if it was convinced that it lacked jurisdiction. The court below denied the motion on January 10, 2002 (App. C). The instant Petition for Writ of Certiorari followed.

Petitioners ask this Court to hear the questions presented in the Petition, to settle this jurisdictional issue generally for the federal courts and for this case. On the merits of the questions, Petitioners ask this Court to reverse the court of appeals and remand this case with instructions to reinstate Plaintiffs' appeal from denial of their Rule 60(b) motion or, in the alternative, to remand this case to the court of appeals with instructions to transfer Plaintiffs' original appeal of denial of their Rule 60(b) motion to this Court under 28 U.S.C. § 1631, in, indeed, the court of appeals lacks jurisdiction.

ARGUMENT

1. Summary of the Importance of the Issues Presented for Review

Although it appears that the factual circumstances which gave rise to this Petition have not been addressed in the past, a consistent line of opinions indicates that the courts of appeals have jurisdiction over an appeal from a decision of a three-judge district court on a motion for relief under Federal Rule of Civil Procedure 60(b) when that decision neither grants nor denies an injunction. The court of appeals below held otherwise, saying it lacked jurisdiction and indicating that jurisdiction of Petitioners' appeal lies in *this* Court.

Given the importance of clear and settled lines of appeal in the federal courts and given that this is a question of first impression, this matter must be taken to be an important federal question. Thus, the court of appeals' decided this matter concerning an important federal question in a way which conflicts with relevant decisions of this Court.

The court of appeals' holding in this matter also threatens to inflate this Court's docket with direct appeals over issues which are not best brought to this Court at an initial appellate stage – cases which would benefit from fuller development in the courts of appeal, before presentation here. Further, leaving such appeals in the courts of appeals (as indicated in this Court's previous treatments of such appeals) would not derogate in the least from the purposes for which Congress established three-judge district courts and would not derogate from the reasons Congress vested this Court with sole jurisdiction over *certain* appeals from such courts.

But if the court of appeals was correct in its jurisdictional holding, then it was in error to fail to transfer Petitioners' appeal to this Court. By failing to transfer the appeal, the court of appeals deprives Petitioners of *any* and *all* chance to review the merits of their appeal.

In this case, especially, it would be an unusually great travesty of justice to deprive Petitioners of a forum for their appeal, since this appeal arises from a motion which is based

upon an uncontested showing that Petitioners have never had their day in court in the most important elements of the underlying case. The claims, arguments, and evidence which lodged their case before a three-judge district court in the first place were *never* addressed, analyzed, or evaluated by any court, though those claims were dismissed in the end (on the basis of analysis of wholly different claims presented by wholly different parties in a wholly separate case). Therefore, Petitioners filed a motion for relief from that judgment of dismissal, so their claims, arguments, and evidence may be addressed. Their motion was denied in almost summary fashion, in an opinion which itself ignores the actual content of the motion itself. So to deny Petitioners of a forum for their appeal would be to compound the denial of due process of law which has marked this case since its earliest months.

If no court hears the issue raised in Petitioner's appeal, Petitioners would be deprived of their "day in court." They were allowed to pay their filing fee and file their documents and evidence, all of which were ignored (and some of which appear to have been lost), then they were dismissed with a single sentence. They were sentenced without a true trial, and this violates basic principles of due process of law.

2. Summary of the Argument on the Merits

In sections 3 and 4 below, Petitioners will show that jurisdiction over Petitioners' appeal from the final decision of a three-judge district court denying Petitioner's motion for relief under Federal Rule of Civil Procedure 60(b) is in the court of appeals under 28 U.S.C. § 1291. Though 28 U.S.C. § 1253 allows for direct appeals to this Court from certain decisions of three-judge district courts, all known decisions of this Court indicate that the decision from which Petitioners' appeal was taken *is not* one covered by 28 U.S.C. § 1253.

If this Court nevertheless finds that the appeal underlying this Petition is properly under the jurisdiction of this Court rather than under that of the court of appeals, the Court should take steps to have the appeal transferred to this Court. This is demonstrated in sections 5 and 6 below.

To minimize confusion at the outset, Petitioners distinguish three discrete sets of questions to which they will refer in the course of this argument. These three sets of questions may be referred to as jurisdictional questions, due process questions, and apportionment questions. Only the first set is directly at issue in this Petition, while the second is pertinent to decision on the first. The questions before this Court in this Petitioner are jurisdictional questions; they concern which court has jurisdiction over Petitioner's appeal. The due process questions – which *are not* before this Court for decision (at least at this time) – are whether Petitioners' should prevail on a motion under Federal Rule of Civil Procedure 60(b) for relief from a judgment of a three-judge district court. Although these due process questions are not before the Court at this time, their terms and content may indicate the proper answer to the questions before the Court. The apportionment questions – which *are not* at issue in this Petition in any way and which *are not* at issue in Petitioners' Rule 60(b) motion – are the questions presented in Petitioners' *Complaint*, which lodged their case before a three-judge district court in the first instance.

3. The Court of Appeals has Jurisdiction Over Petitioners' Appeal

The appeal to the court below was taken from a final decision of a district court of the United States. The basic or "default" statement of jurisdiction over appeals from final decisions of the district courts is found in 28 U.S.C. § 1291 (reprinted in App. D), which provides (in pertinent part) that,

> [t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . *except* where a direct review may be had in the Supreme Court. [emphasis added]

In the instant matter, the final decision from which Petitioners' took an appeal was entered by a district court, so the appeal was taken to the appropriate court of appeals under 28 U.S.C. § 1291.

The court of appeals nevertheless dismissed Petitioners' appeal, saying that "[t]his appeal from the three-judge district court's denial of relief from judgment under Federal Rule of Civil Procedure 60(b) is not properly taken to this court." (App. A). In support of this decision, the lower court cited 28 U.S.C. § 1253 and 28 U.S.C. § 2284(a).[6] So it is necessary to inquire whether these statutes indicate that jurisdiction over Petitioners' appeal lies elsewhere than in the court of appeals.

4. There is no Direct Appeal to this Court Under the Facts of Petitioners' Appeal

Section 2284(a) of Title 28, United States Code (cited by the court below), defines some of the circumstances under which a district court of three judges might be convened. "A district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts" (*see* App. D for full text). This provision applied to *Adams*' Complaint (*see* App. E), so it was properly before such a court (*see* App. F).

But Section 2284(a) doesn't say anything about appeals from such a court – much less define the court to which an appeal is properly taken. *See* 17 Wright, Miller, and Kane, *Federal Practice and Procedure: Jurisdiction 2nd* § 4040 (2nd ed. 1999) (at 138 n.8: 28 U.S.C. § 2284 makes no independent provision for Supreme Court review). Since Section 2284(a) doesn't indicate what court has jurisdiction over appeals from a district court of three judges, it's unclear why the lower court cited this Section in support of its decision that it lacked jurisdiction over this matter and its citation cannot be taken as supporting its jurisdictional finding.

But the lower court also cited Section 1253 of Title 28, which clearly does define some circumstances under which a court of appeals *lacks* jurisdiction over appeals from a district court of three judges. Section 1253 provides that,

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[6] No additional reasoning or authority was provided in the lower court's Order denying Petitioners' motion to reconsider (*see* App. C).

> [e]xcept as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

Parsing this statute for "elements" triggering its application (and rearranging them a bit), one may say that an appeal from an order of a three-judge district court is properly taken to this Court if (first) the suit was properly before a district court of three judges, if (second) the order appealed from was issued after notice and hearing, and if (third) the order granted or denied an interlocutory or permanent injunction.

On its face, Section 1253 does not confer on this Court jurisdiction over appeals from *all* decisions of a three-judge district court. If all the elements of Section 1253 are not satisfied (and if the law has not "otherwise provided"– which it has not, as relevant to this case or issue), then the appeal is properly taken to the appropriate court of appeals, pursuant to 28 U.S.C. § 1291 (the basic or "default" appellate jurisdictional statute, as noted above).

As to the first element, Petitioners' suit – or at least that part of it on which the three-judge district court entered judgment on March 20, 2000 (*see* Apps. G & H) and as to which Petitioners' filed their Rule 60(b) motion (*see* App. I) – was properly before a district court of three judges (*see* App. F). So the first "element" of Section 1253 is satisfied.

But under the facts of the matter before the Court, it cannot be said that the order appealed from (i.e. the denial of the 60(b) Motion), was issued after notice and hearing. No "hearing" – as that term is usually used, to mean a hearing in open court, *see Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 (1978); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) – was held, nor was notice of such a hearing ever issued. So on the second "element," Section 1253 doesn't appear to apply to the instant matter. But this point pales next to the following.

Though "a labyrinthian and even bizarre body of jurisdictional rules has grown up" to construe 28 U.S.C. § 1253, 17 Wright, Miller, and Kane, *supra*, § 4040 (at 134), one rule is constant in this Court's jurisprudence: direct appeal to the Supreme Court under 28 U.S.C. § 1253 will lie *only* from decisions which grant or deny an injunction. *Carey v. Wynn*, 439 U.S. 8 (1978); *Gunn v. Univ. Comm. to End War in Viet Nam*, 399 U.S. 383, 386-87, 390 (1970);[7] *Mitchell v. Donovan*, 398 U.S. 427, 430-31 (1970);[8] *Goldstein v. Cox*, 396 U.S. 471, 475-76 (1970); *American Ins. Co. v. Lucas*, 314 U.S. 575 (1941); *Public Service Comm'n v. Brashear Freight Lines*, 306 U.S. 204, 206-07 (1939). Thus, the primary, dispositive test whether a court of appeals or the Supreme Court has jurisdiction of any given appeal from a decision of a properly convened three-judge district court is the relief at stake in the decision from which appeal is taken. *See Melendez v. Shultz*, 486 F.2d 1032, 1034 (1st Cir. 1973); *Thomas v. Heffernan*, 473 F.2d 478 (2nd Cir. 1973).

Thus, any order of a district court of three judges which *does not* grant or deny an injunction is properly taken to the appropriate circuit court of appeals. *Buchanan v. Evans*, 423 U.S. 963, 963 n.1 (1975) (Rehnquist, J., dissenting (on other grounds)); *Steffel v. Thompson*, 415 U.S. 452 (1974); *see also New York Pub. I.R.G., Inc., v. Regents of Univ. of St. of N.Y.*,

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[7] "[28 U.S.C. § 1253] is . . . explicit in authorizing a direct appeal to this Court only from an order of a three-judge district court 'granting or denying . . . a interlocutory or permanent injunction.' . . . [I]t is precisely because the District Court has issued neither an injunction, nor an order granting or denying one, that we have no power under § 1253 either to 'remand to the court below' or deal with the merits of this case in any way at all." (footnote omitted).

[8] "Section 1253 by its terms grants this Court jurisdiction only of appeals from orders granting or denying injunctions. . . . We have stressed that the three-judge-court legislation is not 'a measure of broad social policy to be construed with great liberality,' but is rather 'an enactment technical in the strict sense of the term and to be applied as such.' Thus this Court's jurisdiction under that legislation is to be literally construed." (citations omitted).

516 F.2d 350, 351 n.1 (2nd Cir. 1975). In light of the consistent pattern of this Court's construction of Section 1253, the courts of appeals have acknowledged that "there can be no question but that appellate courts are frequently required to review the merits of constitutional issues decided by properly convened three-judge courts[,]" *Wilson v. Edelman*, 542 F.2d 1260, 1278 (7th Cir. 1976); *Beare v. Briscoe*, 498 F.2d 244 & n1 (5th Cir. 1974); *Dove v. Bumpers*, 497 F.2d 895 (8th Cir. 1974); *Melendez, supra*, 486 F.2d at 1033-34.

In the instant matter, the district court's *Order* denying Appellants' Rule 60(b) motion did not grant or deny any sort of injunction (*see* App. B). No injunction was at issue in *Adams'* Rule 60(b) motion (*see* App. I). Further, Petitioners' Rule 60(b) motion didn't involve – much less require – review of the *merits* of the underlying claims which lodged the case before a three-judge district court in the first place, so denial of Petitioners' Rule 60(b) motion didn't amount to denial of the injunction requested in the *Complaint* and, if the motion had been *granted*, no injunction would have necessarily have followed; the court could have granted the motion only to dismiss *Adams'* claims for reasons of lack of standing or for other reasons not pertinent to resolution of the constitutional claims which lodged their case before a three-judge district court in the first place.

In short, under the construction of Section 1253 defined in this Court's opinions noted above, appeal from the three-judge district court's denial of Petitioners' Rule 60(b) motion is properly to the court of appeals, not to this Court.

This relatively clear rule notwithstanding, at least two courts of appeals have concluded that a certain class of appeals from decisions of three-judge district courts still cannot be heard by a court of appeals, *even if* the judgments appealed from do not grant or deny injunctions. *Wilson, supra*, 542 F.2d 1260, 1278 (7th Cir. 1976), and *Weiser v. White*, 505 F.2d 912 (5th Cir. 1975). In essence, the rule evident in *Wilson* and *Weiser* is that a court of appeals cannot review a judgment of a three-judge district court if the court of appeals would have to "review the *same* constitutional claims which

constituted the jurisdictional basis of the three-judge district court" in the first place. *Wilson, supra*, 542 F.2d at 1279 (emphasis added). "[T]he question [is] whether an appellate court has jurisdiction to review a plaintiff's appeal from [a decision of] a three-judge court when a resolution of that appeal *requires review of the precise issues* decided by the three-judge court in denying plaintiff's request for injunctive relief as well." *Id.* at 1278 (emphasis added; footnote omitted). *Wilson* and *Weiser* concluded that such cases raise issues which are "so dependent upon the controlling issue" which lodged the case before a three-judge courts in the first place and are "so involved with the purpose behind the direct appeal provisions" that, for "proper review," the issue should go to the Supreme Court, which has jurisdiction over that original, controlling issue. *Weiser, supra*, 505 F.2d at 915.

On similar reasoning, the D.C. Circuit *found* jurisdiction in a case styled *Castro County, Texas v. Crespin*, 101 F.3d 121 (D.C. Cir. 1996), a case under the Voting Rights Act, 42 U.S.C. § 1973 *et seq.*, *despite* a statutory decree that "any appeals" from a Voting Rights Act case must go to the Supreme Court. *See* 42 U.S.C. § 1973c. The D.C. Circuit kept jurisdiction over the appeal in *Castro County* because the court found that the appeal in that case *did not* require "'review of any meaningful judicial determination made in the progress'" of the Voting Rights Act suit, from which the appeal was taken. 101 F.3d at 125 (quoting *NAACP v. New York*, 413 U.S. 345, 353-45 (1973)).

Though well-reasoned, this Court has not ratified this rule and the Fifth Circuit has reversed its conclusion as to appeals under the pattern of facts presented in *Wilson*. *See Watkins v. Fordice*, 7 F.3d 453, 455 n.2 (5th Cir. 1993). This rule, moreover, depends entirely upon the specific facts of the appeals at issue.

On the specific facts of *this* case, the rule framed in *Wilson*, *Weiser*, and *Castro County* does not apply here. The appeal which gave rise to the jurisdictional questions presented in this Petition does not require "review of the precise issues decided by the three-judge court" in the its March 20, 2000 judgment (to quote *Wilson, supra*, 542 F.2d at

1278), nor does it require "review of any meaningful judicial determination made in the progress" of the apportionment issues decided by the three-judge district court in its March 20, 2000 judgment (to quote *Castro County, supra*, 101 F.3d at 125 (itself quoting *NAACP, supra*, 413 U.S. at 353-45)).

The legal issues presented in *Adams*' Rule 60(b) motion – based on the Due Process Clause of the Constitution, U.S. Const, Amend. V (*see* App. I) – are distinct from and completely independent of the apportionment-related issues presented in *Adams*' Complaint – based on the equal protection provisions of the Constitution, Amend. V &/or Amend. XIV, § 1 and the Guarantee Clause, U.S. Const., Art. IV, § 4 (*see* App. E). *Adams*' Rule 60(b) motion boils down to the following claim:

> [T]he judgments from which [*Adams*' Plaintiffs] wish to be relieved were entered in violation of due process of law, so are void as a matter of law. The essence of the due process violation is that the unique claims, arguments, and evidence presented by Plaintiffs in [*Adams*] were merged within and ignored in preference to antithetical claims and arguments presented in a case formerly consolidated with [*Adams*]. In short, the unique claims, arguments, and evidence presented by these Plaintiffs have never been analyzed, as they should be.

Memorandum of Points and Authorities in Support of Motion to Relieve Plaintiffs . . . of Judgments Entered on March 20, 2000 by the Three-judge District Court (filed February 28, 2001) at 1; *see also* App. I at ¶¶ 10-15. Consequently, the factual question in *Adams*' Rule 60(b) motion is whether *Adams*' claims and arguments *differ from* and/or are absent from the three-judge court's March 20, 2000 judgment (*see* Apps. G & H; *see also* App. J (factual comparison of district court's Memorandum Opinion with claims, arguments, and evidence presented in each case)). On its face and in its substance, no apportionment of any congressional district is jeopardized in *Adams*' Rule 60(b) motion.

In contrast, the (foremost) claim which lodged *Adams'* Complaint before a three-judge district court in the first place is that Plaintiffs are denied equal protection of the laws because, although at certain times in the past *all* people who resided in places over which Congress exercised the power of "exclusive Legislation" under the Constitution (Art. I, § 8, Cl. 17) were *excluded* from apportionments of congressional districts, only the residents of the District of Columbia remain *excluded* from such apportionments, while all other people, now or ever in the past under the same power of "exclusive Legislation" are *included* in those apportionments, and there is no narrowly tailored, compelling governmental purpose necessitating the adverse, differential treatment of Plaintiffs. *See* App. E at ¶¶ 13-87; *Adams' Memorandum of Points and Authorities in Support of Application for a Three-judge District Court* (June 30, 1998); *Adams' Memorandum of Points and Authorities in Support of the Motion for Summary Judgment in Favor of Twenty Citizens of the District of Columbia* (Dec. 22, 1998) at 15-18, 31-57. Consequently, the factual question(s) in *Adams'* Complaint, with reference to apportionments of congressional districts, are whether there was a time when all people under Congress's power of "exclusive Legislation" were excluded from apportionments because they were not citizens of any state, whether Congress changed the status of certain sub-groups of that class, whether those whose status was changed by Congress are now included in apportionments, and whether there are any compelling governmental reasons for the differential treatment of District residents (*see* App. E).

In short, *Adams'* Rule 60(b) motion tests whether the three-judge district court violated due process of law when it ignored *Adams'* actual claims, arguments, and evidence and dismissed those claims on the basis of its analysis of *another case's* claims and arguments. In contrast, *Adams'* Complaint tests whether Congress violates equal protection (by and through Appellees) when it excludes Plaintiffs from present apportionments of congressional districts, while Congress has taken steps to include all identically-situated people.

To review denial of *Adams*' Rule 60(b) motion, an appellate court need only examine whether *Adams*' apportionment-related claims, arguments, or evidence were analyzed by the three-judge district court in its March 20, 2000 judgment, or did the three-judge district court only address the claims and arguments presented in *Alexander*, the case consolidated with *Adams*. Thus, an appellate court need only *distinguish* an apple from an orange, without taking a bite of or passing judgment on either the apple or the orange and without *reviewing* the judgment of *anyone else* on that apple and orange.

To review *Adams*' Rule 60(b) motion, an appellate court *need not* decide whether *Adams*' (or *Alexander*'s, for that matter) underlying claims or arguments are sound, much less whether they challenge the constitutionality of present apportionments of congressional districts, and an appellate court certainly need not examine whether present apportionments are constitutional or not. An appellate court *need not* "review" the merits of *Adams*' apportionment-related claims, as the term "review" is commonly used. *See Black's Law Dictionary*, 1186 (5th ed. 1979) ("review" means "[t]o reexamine judicially . . . ; second examination; revision; consideration for purposes of correction."); *Ballantine's Law Dictionary*, 1114 (3rd ed. 1969) ("review" means "[a] consideration by an appellate court of the decision of an inferior court, contemplating the affirmance, reversal, or modification of such decision in accordance with the law.").

Thus, in reviewing *Adams*' Rule 60(b) motion, an appellate court would not intrude into the significant, unique tasks committed to the jurisdiction of three-judge district courts under 28 U.S.C. § 2284(a), and then to the Supreme Court on appeal under 28 U.S.C. § 1253, to weigh constitutional challenges to apportionments of congressional districts. *See U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 444-47, 457-59 (1992); *Com. of Mass. v. Mosbacher*, 785 F.Supp. 230, 234-36 (D.Mass. 1992), *aff'd sub nom Franklin v. Massachusetts*, 505 U.S. 788, 790-96 (1992). Since Section 1253 allows direct appeal "as a means of accelerating a final

determination on the merits" of *certain* matters, *Gonzalez v. Automatic Emp. Credit Union*, 419 U.S. 90, 96 (1974), the purpose of the placing a given case before a three-judge district court is placed at issue. When that purpose is to "sav[e] ... federal [apportionments] from improvident doom at the hands of a single judge," *MTM, Inc. v. Baxley*, 420 U.S. 799, 804 (1975), then direct appeal under Section 1253 would be inappropriate and unnecessary if no apportionment is jeopardized in a decision from which an appeal arose. *See Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 318-19 (1985) (this Court's jurisdiction under Section 1253 turns on the *purpose* of the direct appeal statute).

Also, a proceeding under Rule 60(b) is "an independent action or proceeding" to rectify injustice. *Shay v. Agricultural Stabilization and Conservation State Committee*, 299 F.2d 516, 524 (9th Cir. 1962); *Hadden v. Rumsey Products*, 196 F.2d 92, 96 & n.9 (2nd Cir. 1952). Rule 60(b) does not disturb the finality of the judgment from which relief is sought, *Hodgson v. United Mine Workers of America*, 473 F.2d 118, 124 n.28 (D.C. Cir. 1972), and if a Rule 60(b) motion is granted, the underlying judgment still *stays in place* insofar as it bears on parties and claims not subject to the relief. In an *appeal* from decision on a Rule 60(b) motion, only the merits of the Rule 60(b) motion itself are brought up to the court of appeals, *not* the merits of the underlying decision from which relief was sought under Rule 60(b). *Browder v. Director, Dept. of Corrections*, 434 U.S. 257, 263 n.7 (1978); *Sanders v. Clemco*, 862 F.2d 161, 169 (8th Cir. 1988); *U.S. v. Cirami*, 535 F.2d 736, 741 (2nd Cir. 1976); *Hodgson, supra*, 473 F.2d at 124 n.28.

Thus an appellate court weighing the issue raised on appeal from decision on Petitioners' Rule 60(b) motion would do *less* than the D.C. Circuit itself decided it was competent to do in *Castro County, supra*, when that court decided that courts of appeals could review a lower court's decisions on motions for attorneys' fees and costs in a Voting Rights Act case. It's common, in such motions, that an attorney's work might be challenged on the grounds that it did not contribute to resolution of the case, so payment for the work should not

be compensated. *See, e.g., City of Riverside v. Rivera*, 477 U.S. 561, 567-79, 582-86, 589-95 (1986) (per Brennan, J.; Powell, J., concurring; Rehnquist, J., dissenting); *In re Ill. Congressional Districts Reappor. Cases*, 704 F.2d 380, 382-84 (7th Cir. 1983); *Synanon Foundation, Inc. v. Bernstein*, 517 A.2d 28, 31-35 (D.C.App. 1986). In accepting the appeal in *Castro County*, the lower court accepted the burden of reviewing disposition of such debates, which requires some *examination* of the merits of the underlying suit and *review* of the merit of the attorney's work. *Compare Riverside, supra*, 477 U.S. at 567-79 & 582-86 with 477 U.S. at 589-95. *See also American Ins. Co. v. Lucas*, 38 F.Supp. 926 (W.D.Mo.) (three-judge court), *app. dismissed*, 314 U.S. 575 (1941) (appeal of denial of motion for new trial, which required review of same merits as placed the case before the three-judge district court).

In Petitioner's appeal from the district court's decision on Petitioners' Rule 60(b) motion, in contrast, the court would have no occasion to review whether a given claim, argument, or submission of evidence had *any* merit. As noted above, the court need only observe whether *Adams* actual claims, arguments, or evidence were *addressed in* the district court's March 20, 2000 judgment. Thus also, the court of appeals would do less than it would in other appeals from three-judge district courts which are clearly under the jurisdiction of courts of appeals – such as appeals from dismissals on grounds which would have led to dissolution of the three-judge court in the first place. *See, e.g., Gonzalez, supra*, 419 U.S. at 101. In those appeals, courts of appeals have to review the district court's judgment concerning (for instance) injury or redressability (if the dismissal was on grounds of standing), all of which involve review of *merits* of claims which, again, is not the case in the underlying appeal here.

At bottom, this analysis reflects this Court's rule that direct appeal under 28 U.S.C. 1253 will lie "*only* where such order *rests upon resolution of the merits* of the constitutional claim presented below." *MTM, supra*, 420 U.S. at 804 (emphasis added). Since decision on Petitioners' Rule 60(b) motion *does not* "rest upon resolution of the merits of the

constitutional claim" which landed the case before a three-judge district court in the first place, an appeal from denial of the motion is properly taken to the court of appeals, rather than to this Court. *See* Kenneth R. Redden, ***Federal Special Court Litigation***, 494 (1982) (footnotes omitted). This leads to the answer to the first question presented in this Petition: the courts of appeal have jurisdiction over appeals such as the one underlying this Petition.

5. An Alternative Conclusion

But if the court of appeals is correct that it lacks jurisdiction over Petitioners' appeal from the district court's denial of their Rule 60(b) motion, then *this* Court becomes the proper forum for such appeals. On one hand, 28 U.S.C. § 1291vests jurisdiction over "all final decisions" of the district courts "*except* where a direct review may be had in the Supreme Court" (emphasis added), so the plain language of the relevant jurisdictional statutes would mean that the courts of appeals lack jurisdiction over appeals (such as those at issue in this case) only when jurisdiction over such appeals is vested in this Court. On the other hand, to conclude simply that the courts of appeals lack jurisdiction *without* then proceeding to transfer to this Court an appeal filed in the courts of appeals – in good faith reliance on the apparent jurisdictional statutes and opinions of this Court construing those statutes – would runs afoul of fundamental precepts of our judicial system. This Court has taken a dim view of leaving appellants without *any* forum for their appeals, as has the court below. When this Court has determined that it does not have jurisdiction, it has taken care to send the case to the proper forum. *See Mitchell, supra*, 398 U.S. at 431-32; *H.F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe*, 432 F.2d 689, 691 (D.C. Cir. 1970); Redden, *supra*, at 494.

So if the Court finds that the court of appeals lacks jurisdiction over Petitioners' appeal from the three-judge district court's decision on Petitioners' Rule 60(b) motion, steps should be taken to transfer the appeal from the court of appeals to this Court. Such a transfer is possible under 28

U.S.C. § 1631, which provides (in pertinent part) that,

> Whenever . . . an appeal . . . is noticed for or filed with [a court as defined in section 610 of this title] and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such . . . appeal to any other such court in which the . . . appeal could have been brought at the time it was filed or noticed, and the . . . appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed on or noticed for the court from which it is transferred.

Certainly, it is in the interests of justice that Petitioners' appeal from decision on their Rule 60(b) motion be heard in an appropriate forum. The uncontroverted facts are that the district court entered judgment on *Adams'* underlying, original claims on the basis of and according to the court's analysis and disposition of *wholly antithetical* claims and arguments presented in an antagonistic case, into which *Adams'* had been improperly *merged*. This amounts to a remarkable and complete denial of access to the proper forum in which to test *Adams'* claims and it therefore violates Plaintiffs' constitutional due process rights. *See Bd. of Trustees, Local 25 v. Madison*, 97 F.3d 1479, 1489 (D.C. Cir. 1996); *Spann v. Comm'rs of the District of Columbia*, 443 F.2d 715, 716 n.1 (D.C. Cir. 1970). Thus, *every* chance should be taken to insure that there is no such egregious denial of due process hence forward and to correct past lapses, insofar as possible.

6. Due Process Requires a Hearing and Explanation of the Reasons Why One Wins or Loses

Due process of law – which led Petitioners to file their Rule 60(b) motion, which led Petitioners to appeal the district court's decision on that motion, and which makes it imperative that this Court settle which "appellate" court has jurisdiction over the appeal – also makes it imperative that

this Court insure that *some* court address the appeal from decision on Petitioner's Rule 60(b) motion.

It has been said that "the two most striking"formal, procedural safeguards required by due process are "the right to be heard and *the right to hear why*[.]" Laurence H. Tribe, *American Constitutional Law*, 744 (2nd. ed. 1988) (emphasis in original). The first of these two safeguards, the right to be heard, is elaborated and discussed in a number of cases. *See, e.g., Mackey v. Montrym*, 443 U.S. 1, 13 (1979); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). But the second of these two formal procedural safeguards is no less important. Due process demands that the tribunal give an explanation, a coherent statement *why* the final decision comes out as it does. *See, e.g., Ponte v. Real*, 471 U.S. 491, 497 (1985); *Wolff v. McDonnell*, 418 U.S. 539, 565 (1974); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167-68 (1962); *Tenn. Gas Pipeline Co. v. F.E.R.C.*, 969 F.2d 1141, 1145 (D.C. Cir. 1992) (quoting *Mobil Oil Corp. v. Dep't of Energy*, 728 F.2d 1477, 1492 (Temp. Emer. Ct. App. 1983), *cert. denied*, 467 U.S. 1225 (1984)); C.A. Wright, *Law of Federal Courts*, 674 (4th ed. 1983) (citing *A.L. Mechling Barge Lines, Inc. v. U.S.* 368 U.S. 324 (1961); *Toilet Goods Assn. v. Gardner*, 387 U.S. 158 (1967), *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967)). While most of these cases setting out the "explanatory" requirements of due process arise from administrative procedure or regulatory process, there is no reason to think these requirements don't apply to district (and appellate) courts. For instance, as this Court said of the procedure under review in *Burlington Truck Lines, supra*, "[t]here are no findings and no analysis here to justify the choice made, no indication of the basis on which the [tribunal] exercised its expert discretion. We are not prepared to and the Administrative Procedure Act will not permit us to accept such *adjudicatory practice*." 371 U.S. at 167 (emphasis added).

Even the very history of deriving definitions of "due process of law" illustrates that a central element of the concept is clear expression of the *reasoning* on which judicial decisions are founded. When federal courts were first inundated with cases bringing due process claims under the (then recently-ratified) Fourteenth Amendment, this Court observed that, while the concept of "due process of law" was not new to Anglo-American jurisprudence, it was still imprecise, *Davidson v. New Orleans*, 96 U.S. (6 Otto) 97, 101-02 (1877), but rather than lay down a conclusive definition at that time, the Court observed that the wiser course would be to ascertain the meaning of the concept over time, by the gradual process of judicial decisions, along with "the reasoning on which such decisions may be founded." *Id.* at 104. *See also Spallone v. United States*, 493 U.S. 265, 274 (1990) ("Before discussing the principles informing our conclusion . . . .").

So a court's decision is based on *reasons*, "those portions of the opinion setting forth the rules of law applied by the court" and these reasons are "*required* for the determination of the issues presented." Edmund M. Morgan, *Introduction to the Study of Law*, 155 (2nd ed. 1948) (emphasis added); *accord* Rupert Cross, *Precedent in English Law*, 35-101 (2nd ed. 1968); Carleton K. Allen, *Law in the Making*, 247 (6th ed. 1958); John C. Gray, *The Nature and Sources of the Law*, 261 (2nd ed. 1921). It is "the intrinsic merit" of the court's *reasons* "which validates a judicial decision . . . [,] not the will or fiat of the judges[.]" Edgar Bodenheimer, *Jurisprudence; the Philosophy and Method of the Law*, 342 (rev'd. ed. 1974) (discussing the doctrine of judicial precedents). Thus, it is a commonplace that cases should be decided "on their merits," which is to say, on the actual claims, arguments, and evidence presented in the case (*Ballentine's Law Dictionary*, 795 (3d ed. 1948)). *See MIF Realty L.P. v. Rochester Assoc.*, 92 F.3d 752, 756 (8th Cir. 1996) (Rule 60(b) motion at issue); *Moore v. City of Paducah*, 790 F.2d 557, 562 (6th Cir. 1986) (despite demands to move a busy docket, parties are entitled to be heard on the merits); *Univ. Film Exch. Inc. v. Lust*, 479

F.2d 573, 576 (4th Cir. 1973) (Rule 60(b) motion at issue) (footnote omitted; citing *Tolson v Hodge*, 411 F.2d 123 (4th Cir. 1969) and *Tozer v. Charles A. Crause Milling Co.*, 189 F.2d 242 (3d Cir. 1951)); *Spann, supra*, 443 F.2d at 716 n.1.

At the very least, a showing of specific findings and coherent rational analysis is the foundation for later consideration of the case or the parties' claims. Courts of appeals, for instance, require some showing of reasons for decisions from which appeals are taken, in order to review lower court decisions. *See Goland v. CIA*, 607 F.2d 339, 371 (D.C. Cir. 1978) (Rule 60(b) motion at issue) (noting that court of appeals "has no fact-finding function" and concluding that 60(b) is proper recourse when facts at issue were not reviewed or adjudicated on the record); *Spann, supra*, 443 F.2d at 716 (Rule 60(b) motion at issue); *Swann v. Adams*, 385 U.S. 440, 443-44, 445, *reh denied*, 385 U.S. 997 (1967); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 678 (1930); Rule 50, Seventh Circuit Court of Appeals.

More generally, courts are obliged to conduct litigation in such a way "as to insure the full and fair consideration" of the issues before the court. *Richardson v. Jefferson County, Ala.*, 517 U.S. 793, 801 (1996) (quoting *Hansberry v. Lee*, 311 U.S. 32, 43 (1940). *See also Board of Ed. of Oklahoma City v. Dowell*, 498 U.S. 237, 249-50 (1991); *Duggins v. Steak 'n Shake, Inc.*, 195 F.3d 828 (6th Cir. 1999) (emphasizing "the need for the district court to give reasons for its decision"); *Webb v. District of Columbia*, 146 F.3d 964, 971-72 (D.C. Cir. 1998) (saying the district court must "explain its reason for issuing a default judgment" and saying this "*duty to explain*" arises, in part, from "the intrinsic need for self-restraint in using so powerful a weapon" and concluding that a district court "must state *why* . . . less onerous sanctions are not sufficient."); *Murray v. Weinberger*, 741 F.2d 1423, 1429 (D.C. Cir. 1984) (saying "the district court failed to specify with particularity the reasons" for its decision so remanding the case so the court may "explain fully"); *Gulf Coast Fans v. Midwest Electric Importers*, 740 F.2d 1499, 1512 (11th Cir. 1984).

But beyond individual rights to due process in a given case and beyond the functional necessities of appellate review, the *reasons given* for the ultimate "answer" to the questions presented in any given case serve extremely important public interests. Nothing short of full hearing and explanation of judgment "convey[s] to the individual a feeling that the government has dealt with him fairly." *Carey v. Piphus*, 435 U.S. 247, 262 (1978). These explanations of judgments, moreover, are the *precedents* on which later litigants and the public rely for understanding what the law is.

> The case is not alone considered as decided and settled[unless] the principles of the decision are held, as precedents and authority, to bind future cases of the same nature. This is the constant practice under our whole system of jurisprudence. Our ancestors brought it with them, when they first emigrated to this country; and it is, and always has been considered, as the great security of our rights, our liberties, and our property. It is on this account, that our law is justly deemed certain, and founded in permanent principles, and not dependent upon the caprice or will of judges. A more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles.

Joseph Story, *Commentaries on the Constitution of the United States* §§ 377-78 (1833).

Absent *reasons* for decision, one could only know that a certain claim was ever filed, for mere final judgment says little or nothing of the *merits* of the claim. Thus, questions presented in a case cannot be left to "lurk in the record" without having been addressed, since they are no precedent for later adjudication without full explication in the record. *Webster v. Fall*, 266 U.S. 507, 511 (1925); *accord United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (an issue not discussed by the court cannot be taken as binding

precedent on the point).

> In a government which is emphatically styled a government of laws, the least possible range ought to be left for the discretion of the judge . . . perhaps nothing conduces more to that object than the publication of reports. Every case decided is a check upon the judge. He cannot decide a similar case differently, without strong reasons, which, for his own justification, he will wish to make public.

William Cranch, *Preface*, 1 Cranch (5 U.S.) iii (1804); *see also* Tribe, *supra*, at 667. "[The] validity and moral authority of a conclusion largely depend on the mode by which it was reached. . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring).

Thus, due process of law requires more than an opportunity to pay a fee and file some papers then, at some later time, receive a piece of paper saying only "claim granted" or "claim dismissed." And due process of law requires more than an opportunity to file even hundreds of pages of legal briefs in support or opposition to the claim in the interim, even hours of oral argument, even unlimited evidence in any form. After paying the fees, filing the claim, submitting the briefs and evidence, and after arguing the case, *but before entry of that final order granting or dismissing the claim*, the claimant, the party against whom the claim is filed, the courts of appeal, any other courts anywhere who may ever have a similar case, and the public at large have a right to know *why the court hearing the case granted or dismissed the claim*.

All these principles take on special importance in situations where two or more cases are consolidated, for there is an ever-present risk that consolidation will result in *merger* of all cases into a single case. *Johnson v. Manhattan Ry.*, 289 U.S. 479, 496-97 (1933); *Synar v. United States*, 626

F.Supp. 1374, 1379 (D.D.C. 1986). Thus, courts must be careful lest consolidation "goes beyond [its] permissible objects to deny a party his *due process right* to prosecute his own separate and distinct claims or defenses without having them so merged into the claims and defenses of others that irreparable injury will result." *Garber v. Randell*, 477 F.2d 711, 716 (2d Cir. 1973) (emphasis added). "The systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff's – and defendant's – cause not be lost in the shadow of a towering mass litigation." *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853 (2d Cir. 1992); *accord Arnold v. Eastern Air Lines, Inc.*, 712 F.2d 899, 906 (4th Cir. 1983) (en banc), *cert. denied*, 464 U.S. 1040 (1984); *Baker v. Waterman S.S. Corp.*, 11 F.R.D. 440, 441 (S.D.N.Y. 1951) ("a fair and impartial trial to all litigants" is the foremost concern when considering consolidation). In short, each case retains "its own separate identity." *Cella v. Togum Constructeur Ensemleier*, 173 F.3d 909, 913 (3d Cir. 1999) (citing *Johnson, supra*, and *Stavey v. Charles J. Rogers, Inc.*, 756 F.2d 440, 442 (6th Cir. 1985)). Parties in each case retain their due process rights to a hearing and to know why their claims are disposed of as they may be in the end.

In the instant matter, Petitioners have shown that the judgment of the three-judge district court entered on March 20, 2000 dismissing their apportionment-related claims is based on analysis of claims and arguments which were so at odds with Petitioners' claims that they might as well have been lodged *against* Petitioners by the defendants in the case (*see* App. J). Petitioners have shown, moreover, that when the district court's "reasoning" is applied to Petitioner's claims and arguments, the result is a tautology, the most extreme form of the logical fallacy called "begging the question"[9] (*see*

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[9] *See* Joseph G. Brennan, *A Handbook of Logic*, 218-20 (2d ed. 1961) ("This fallacy occurs in any argument in which we assume as true what is to be proven."); Morris R. Cohen and Ernest Nagel, *An Introduction to Logic and Scientific Method*, 379 (1934) ("It is . . . a

App. I at ¶ 13; App. J at 64-66). Defendants presented no evidence that these showings are not correct. Therefore, Petitioners were denied due process of law before the three-judge district court on their original claims.

Petitioners addressed this in the best possible form to address it – before the same district court – with a motion for relief from judgment under Federal Rule of Civil Procedure 60(b)(4) & (6). Yet, in deciding that motion, the court once again merged *Adams* into *Alexander*, saying that "Plaintiffs contend that the court misunderstood their arguments, and that therefore both the Memorandum Opinion and the accompanying Dissenting Opinion failed to address and analyze those arguments" (App. B at 1), when, in fact, Plaintiffs said that the court "only actually discusses the claims presented in *Alexander*" and "subsumed" *Adams*' claims "within the claims in *Alexander*" (App. I at ¶¶ 10-11). The court also said it "simply disagreed with [plaintiffs'] reading of the law" (App. B at 2), although plaintiffs had said that, "With a few technical exceptions (the details which do not alter the dispositive points made by the Court), *Adams* Plaintiffs agree with the Three-judge District Court's analysis of the merits of *Alexander*" (App. I at ¶ 12) and although the court itself (majority) prefaced its March 20, 2000 Judgment with the declaration that the judgment was "[f]or the reasons stated in the accompanying Memorandum Opinion" (App. H at 1).[10] Since Petitioners agree with the salient, dispositive points in the district court's Memorandum Opinion and since the court apparently agrees with Petitioners that a court's judgment should be based on expressed reasoning, one cannot identify the points of law on which the court and Petitioners "disagree." The net effect compounds the denial of due process, for the court didn't address the clear

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fallacy to claim to have proved a proposition at issue if it has been smuggled . . . into our premises.").

[10] Though those "reasons" concerned only the claims and arguments presented in *Alexander v. Daley* and have no logical or analytical bearing on the claims, arguments, or *evidence* presented in *Adams v. Bush* (*see* factual comparison in App. J).

allegations in Petitioners' Rule 60(b) motion itself.

Therefore, Petitioners appealed that denial to what, in good faith reading of the relevant jurisdictional statutes and of all courts' constructions of those statutes, appeared to be the proper court – the U.S. Court of Appeals for the D.C. Circuit. That court dismissed Petitioners' appeal with a one-sentence statement. Thus, there is no clear record indicating *why* the underlying appeal was not properly before the court of appeals, other than in the court's general reference to a statute which created three-judge district courts to hear certain claims and a statue which confers appellate jurisdiction on this Court for a certain class of appeals. The net effect of this was to compound the denial of due process even further.

It's time to fix this problem. Petitioners' claims deserve their day in court. While the proceeding at this stage is not the proper time to address these claims, this Court can take steps to put this case on the right path to a time and place where those claims *can* be addressed, and which will remedy the remarkable denial of due process of law which has attended this case so far. If jurisdiction over Petitioners' underlying appeal is in the court of appeals (as the law seems to indicate), then the Court should send the case back to the court of appeals for review. But if jurisdiction over Petitioners' underlying appeal is in *this* Court, the Court should take steps to have that appeal transferred *here*.

CONCLUSION

For the reasons stated above, it was an error for the court of appeals below to dismiss Petitioners' appeal. The Court should issue a Writ of Certiorari, reverse the court of appeals, and remand the matter for reinstatement of Petitioners' appeal from the decision of the district court denying Petitioners' Rule 60(b) motion, all under 28 U.S.C. § 1291.

In the alternative, if the court of appeals below lacks jurisdiction over Petitioners' appeal from the decision of the district court denying Petitioners' Rule 60(b) motion, this case should be sent back to the court of appeals with instructions

that Petitioners' appeal be transferred to *this* Court under 28 U.S.C. § 1631 and 28 U.S.C. § 1253.

Respectfully submitted,
George S. LaRoche,
Petitioners' Counsel of Record

APPENDICES

A: Order, per Randolph and Rogers, Circuit Judges, and Williams, Senior Circuit Judge (October 18, 2001) . A-1–2

B: Memorandum and Order, per Garland, Circuit Judge, and Oberdorfer and Kollar-Kotelly, District Judges (April 4, 2001) B-1–4

C: Order, per Randolph and Rogers, Circuit Judges, and Williams, Senior Circuit Judge (January 10, 2002) and Order, per Ginsberg, Chief Judge; Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland [who did not participate in the matter], Circuit Judges, and Williams, Senior Circuit Judge (January 10, 2002) C-1–2

D: Statutory Provisions at issue D-1–2

other material:

E: Complaint (June 30, 1998) E-1–28

F: Request for Designation of a Three-Judge Court and Memorandum, per Oberdorfer, District Judge, (November 6, 1998) F-1–10

G: Memorandum Opinion, per Garland, Circuit Judge & Kollar-Kotelly, District Judge (March 20, 2000) G-1–60

H: Judgment (*per curiam*), per Garland, Circuit Judge & Kollar-Kotelly, District Judge (March 20, 2000) ... H-1–2

I: Motion to Relieve Plaintiffs Lois E. Adams, *et al.*, of Judgments Entered on March 20, 2000 by the Three-judge District Court (February 28, 2001) I-1–4

J: Analysis of the *Memorandum Opinion* of the Three-judge District Court Entered on March 20, 2000 (February 28, 2001) J-1–84

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-5239

September Term, 2001
98cv01665

Filed On:
OCT 18 2001

Lois E. Adams, et al.,
Appellants

v.

George W. Bush, In his official capacity as The President of the United States and D.C. Financial Responsibility and Management Assistance Authority,
Appellees

01-5132

98cv01665

Lois E. Adams, et al.,
Appellants

v.

George W. Bush, in his official capacity as The President of the United States, et al.,
Appellees

BEFORE: Randolph and Rogers, Circuit Judges;
Williams, Senior Circuit Judge

ORDER

Upon consideration of the court's orders filed August 8 and August 20, 2001, the responses thereto, and the reply; the motion for summary affirmance in No. 01-5132, the responses thereto, and the reply; the motion to set for oral argument, the response thereto, and the reply; the motion to strike and the response thereto; and the motion to consolidate Nos. 00-5239 and 01-5232, it is

ORDERED that No. 01-5132 be dismissed for lack of jurisdiction. This appeal from the three-judge district court's denial of relief from judgment under Federal Rule of Civil Procedure 60(b) is not properly taken to this court. See 28 U.S.C. § 1253, 2284(a). It is

FURTHER ORDERED that the remaining motions in No. 01-5132, namely, the motion for summary affirmance, the motion to set for oral argument, the motion to strike, and the motion to consolidate Nos. 01-5132 and 00-5239, be dismissed as moot.

The Clerk is directed to withhold issuance of the mandate in No. 01-5132 until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

[initialed/]: ARR
[initialed/]: JWR/DL
[initialed/]: SFW

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LOIS E. ADAMS, *et al.*,	)	
Plaintiffs,	)	Civ. No. 98–1665
v.	)	(LFO, MBG, CKK)
GEORGE W. BUSH, *et al.*,	)	
Defendants.	)	

FILED
April 4, 2001
Nancy Mayer-Whittington, Clerk
U.S. District Court

MEMORANDUM

Per Curiam: Plaintiffs move, pursuant to Federal Rule of Civil Procedure 609b), for relief from the judgment entered in this case on March 20, 2000. *See Adams v. Clinton*, 90 F.Supp.2d 35 (D.D.C. 2000). Plaintiffs contend that the court misunderstood their arguments, and that therefore both the Memorandum Opinion and the accompanying Dissenting Opinion failed to address and analyze those arguments. This failure, plaintiffs contend, denied them due process and requires that the judgment be set aside as void under Federal Rule of Civil Procedure 60(b)(4) or in the interest of justice under Rule 60(b)(6). Plaintiffs did not seek reconsideration by this court after the March 20 opinions issued. They did, however, appeal to the Supreme Court, making the same arguments they make here. *See* Jurisdictional Statement, July 17, 2000. The Supreme Court summarily affirmed the judgment of this court. *Adams v. Clinton*, 121 S.Ct. 336 (2000).

We have carefully reviewed the memorandum of points and authorities filed by plaintiffs in support of the instant motion, as well as the memorandum filed in support of plaintiffs by amicus curiae American Friends Service Committee. That review persuades us that we neither misunderstood nor failed to address plaintiffs' claims. Rather, we simply disagreed with their reading of the law. As the

Supreme Court has not affirmed the Memorandum Opinion's conclusion that the law bars us from adopting plaintiffs' legal position, there is no ground for granting relief under Rule 60(b)(4) or for exercising our discretion under Rule 60(b)(6). Accordingly, plaintiffs' motion is denied.

An order accompanies *this memorandum.*

Date: [blank]

s/ MERRICK B. GARLAND
United States Circuit Judge

s/ LOUIS F. OBERDORFER
United States District Judge

s/ COLLEEN KOLLAR-KOTELLY
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LOIS E. ADAMS, *et al.*,	)	
Plaintiffs,	)	Civ. No. 98–1665
v.	)	(LFO, MBG, CKK)
GEORGE W. BUSH, *et al.*,	)	
Defendants.	)	

FILED
April 4, 2001
Nancy Mayer-Whittington, Clerk
U.S. District Court

ORDER

It is this 4 day of April, 2001, hereby

ORDERED that defendant Bush's and House defendants' motions to strike plaintiffs' Rule 609b) motion are DENIED; it is further

ORDERED that the motion of the American Friends Service Committee for leave to file an amicus curiae memorandum in support of plaintiffs' Rule 60(b) motion is GRANTED; it is further

ORDERED that, for the reasons stated in the accompanying memorandum, plaintiffs' Rule 60(b) motion for relief from judgment is DENIED; it is further

ORDERED that plaintiffs' requests to reconstitute the record and to hear oral argument are DENIED; and it if further

ORDERED that defendant Bush's and House defendants' motions for enlargement of time to respond to plaintiffs' Rule 609b) motion are DISMISSED as moot.

Per curiam.

s/ MERRICK B. GARLAND
United States Circuit Judge
s/ LOUIS F. OBERDORFER
United States District Judge
s/ COLLEEN KOLLAR-KOTELLY
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-5132

September Term, 2001
98cv01665

Filed On:
JAN 10 2002

Lois E. Adams, et al.,
Appellants

v.

George W. Bush, in his official capacity as The President of the United States, et al.,
Appellees

BEFORE: Randolph and Rogers, Circuit Judges; and Williams, Senior Circuit Judge

ORDER

Upon consideration of appellant's petition for rehearing filed December 3, 2001, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY:s/ Michael C. McGrail
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-5132

September Term, 2001
98cv01665

Filed On:
JAN 10 2002

Lois E. Adams, et al.,
Appellants

v.

George W. Bush, in his official capacity as The President of the United States, et al.,
Appellees

BEFORE: Ginsberg, Chief Judge; Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel* and Garland,* Circuit Judges; Williams, Senior Circuit Judge

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY:s/ Michael C. McGrail
Deputy Clerk

* Circuit Judges Tatel and Garland did not participate in this matter.

STATUTES

28 U.S.C. § 1291 provides:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1253 provides:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, and interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

28 U.S.C. § 1631 provides:

> Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time the action was filed or noticed, and the action or appela shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

28 U.S.C. § 2284(a) provides:

> A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Twenty Citizens of the District of Columbia, *namely*:	
	CASE NUMBER:
Lois E. Adams, 2712 Wisconsin Ave., N.W. Apt. 508, Wash., D.C. 20007;	98CV01665
Rev. Mr. Floyd H. Agostinelli, 1801 Kearney St., N.E., Wash., D.C. 20018;	JUDGE: Louis F. Oberdorfer
Acie L. Byrd, Jr., 3601 Wisconsin Ave. N.W., Apt. 603, Wash., D.C. 20016;	DECK TYPE:
Lawrence Alston Gray, 600 14th St., N.E., Wash., D.C. 20002;	Three Judge Court
Rev. Graylan Scott Hagler, 6101 16th St., N.W. Apt. 927, Wash., D.C. 20011;	DATE STAMP: 06/30/98
Lawrence Benjamin Harris, 1327 Holbrook St., N.E., Wash., D.C. 20002;	
Richard Hébert, 2801 Adams Mill Rd., N.W., Wash., D.C. 20009;	
Wimberly Higgs, 232 14th Pl., N.E., Wash., D.C. 20002;	
Bette J. Hoover, 626 Quebec Pl., Wash., D.C. 20010;	
Anise Jenkins, 1715 4th St., N.W., Wash., D.C. 20001;	
Rahim Jenkins, 1238 Southern Ave., S.E., Wash., D.C. 20032;	
Marilyn Killingham, 1100 6th St., S.W., Wash., D.C. 20024;	
Dujuan Ricardo Malachi, 5554 Chillum Pl., N.E., Wash., D.C. 20011;	
Lamont B. Mitchell, 1651 38th St., S.E., Wash., D.C. 20020;	
Loree H. Murray, 1134 7th St., N.E., Wash., D.C. 20002;	

Rev. Anita O'Brien-Russell, 660 Acker St., N.E., Wash., D.C. 20002; Antoinette Quick, 2610 Naylor St., S.E., Apt. 301, Wash., D.C. 20020; Sam Smith, 3149 Newark, N.W., Wash., D.C. 20008; Manuel Uriarte, 1304 Girard St., N.W., Wash., D.C. 20009; and Malcolm L. Wiseman, Jr., 1228 Crittenden St., N.W., Wash., D.C. 20011,

Plaintiffs,

versus

William Jefferson Clinton in his official capacity as The President of the United States, 1600 Pennsylvania Avenue, N.W., Washington, D.C. 20500, Robin H. Carle in her official capacity as The Clerk of the United States House of Representatives, Room H-154, The Capitol, Washington, D.C. 20515, Wilson Livingood in his official capacity as The Sergeant At Arms of the United States House of Representatives, Room H-124, The Capitol, Washington, D.C. 20515, and The District of Columbia Financial Responsibility and Management Assistance Authority, One Thomas Circle, N.W., Washington, D.C. 20005,

Defendants

COMPLAINT

The Plaintiffs, by and through undersigned counsel, ask this honorable court to grant them relief from the actions of the Defendants, saying:

Jurisdiction

1. This is an action for declaratory judgements and injunctions to redress the deprivation of rights and privileges secured to the Plaintiffs by the fourth Clause of the Fifth Amendment (the Due Process Clause, incorporating equal protection guarantees) and by the first Clause of the Fourth Section of the Fourth Article (the Guarantee Clause) of the Constitution of the United States; jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331, 1343(a)(3), 2201, and 2202.

Parties

2. Each Plaintiff is a private citizen suing in her or his personal capacity.

3. Each Plaintiff is a competent adult over the age of eighteen years of age.

4. Each Plaintiff is a citizen of the United States.

5. Each Plaintiff is a permanent resident and domiciliary of the District of Columbia.

6. Each Plaintiff is a qualified voter in the District of Columbia.

7. Defendant William Jefferson Clinton in his official capacity as The President of the United States is responsible for ratifying, approving, implementing, and enforcing Acts, Resolutions, or mandates of Congress, including those pertaining uniquely to the District of Columbia, which means pertaining to the place of residence and work of the Plaintiffs and affecting the lives and rights of the Plaintiffs.

8. Defendant William Jefferson Clinton in his official capacity as The President of the United States is also charged to transmit to Congress the results of each decennial census of the population of the United States, specifying the number of Representatives in the United States House of Representatives to be apportioned to each State, as a portion

of the whole number of Representatives defined by Congress and insofar as Congressional legislation provides for numbers to any State in excess of the minimum number specified in the Second Section of Article One of the Constitution, which number is one.

9. Defendant Robin H. Carle in her official capacity as the Clerk of the United States House of Representatives is charged to certify to the chief executive of each State the number of Representatives apportioned to the State, as a portion of the whole number of Representatives defined by Congress and insofar as Congressional legislation provides for numbers to any State in excess of the minimum number specified in the Second Section of Article One of the Constitution, which number is one.

10. Defendant Robin H. Carle in her official capacity as the Clerk of the United States House of Representatives is also charged to keep a roll of all Representatives and Representatives-elect, comprised of those persons, and those persons only, who are elected in accordance with the laws of the United States, specifically in accordance with the apportionments to the States previously certified by the Clerk.

11. Defendant Wilson Livingood in his official capacity as the Sergeant at Arms of the United States House of Representatives is charged to admit to the Hall of the House of Representatives only those Representatives upon the Clerk's Roll (and certain other staff and assistants) and to bar all other persons from admission during the sessions of the House.

12. Defendant District of Columbia Financial Responsibility and Management Assistance Authority (popularly referred to as the "Control Board") is an entity created by an Act of the Congress of the United States but is defined in the Act creating it as an entity of the government of the District of Columbia; it is comprised of five individuals appointed by the President of the United States.

General Factual Predicate to All Counts

13. By a series of acts taken between 1788 and 1791, the States of Maryland and Virginia ceded to Congress exclusive jurisdiction over an area amounting to 100 square miles straddling the Potomac River.

14. In 1791, Congress accepted the cessions and assumed exclusive jurisdiction over the area, since known as the District of Columbia and designated as the location of the permanent seat of the government of the United States.

15. From 1791 until 1801, despite the exclusive jurisdiction and plenary power of Congress over the District of Columbia, the residents of the District enjoyed all rights and privileges as citizens of Maryland and Virginia, respectively according to whether they lived north-east or south-west of the Potomac River, and of the United States.

16. Specifically, from 1791 until 1801, despite the exclusive jurisdiction and plenary power of Congress over the District of Columbia, the residents of the District of Columbia retained general rights to vote for state and national offices and to participate in the governments of their respective states and in the government of the United States, on the same terms and to the same degree as all other citizens of the respective states of Maryland and Virginia.

17. Specifically, from 1791 until 1801, despite the exclusive jurisdiction and plenary power of Congress over the District of Columbia, the residents of the District were apportioned to congressional districts and were apportioned to districts for statewide legislative offices in Maryland and Virginia, respectively.

18. In 1801, Congress passed acts which were taken to have the effect of terminating all rights of state citizenship for all residents of the District of Columbia.

19. In 1846, Congress reduced the size of the physical territory of the District of Columbia and retroceded to Virginia all that part of the original District of Columbia which lay south-west of the high tide line on the south-west shore of the Potomac River.

20. Retrocession of this area of the District of Columbia to Virginia had been specifically requested by the residents of the area beforehand and was ratified by them by popular vote, in order to be effective.

21. In 1871, Congress erected a form of government, loosely modeled on the governments erected previously for the continental "territories," to perform various functions for the entire remaining District of Columbia.

22. In 1874, Congress terminated this "territorial government" and replaced it with a "temporary" government of three commissioners appointed by the President of the United States.

23. In 1878, Congress made the "temporary" 1874 commission form of government permanent.

24. In 1895, Congress eliminated all remaining independent local governments and jurisdictional distinctions within the District of Columbia and placed all aspects of administration or governance of the entire District of Columbia, at all levels, under the rule of the appointed commissioners.

25. In 1973, Congress replaced the 1874 commission form of government with a government comprised of an elected Mayor and Council, supported by administrative agencies and offices (the so-called "home rule government").

26. When Congress created the home rule government, Congress retained for itself the power to alter or abolish the local government of the District at will, retained the power to veto the laws passed by the home rule government, retained the power to impose any law on the District which Congress sees fit, retained the power to veto or amend the District's local governmental budget, retained the power to control the local courts (the Superior Court of the District of Columbia and the District of Columbia Court of Appeals), retained in federal hands the power to determine who will be judges in those courts, retained in federal hands (delegated to the United States Attorney for the District of Columbia) the power to control prosecution of all serious misdemeanors and felonies, imposed certain fiscal burdens on the home rule government, and deprived the home rule government of the power to tax

the income realized in the District by non-residents, among other things.

27. In 1995, Congress placed the home rule government under the supervision of Defendant Financial Responsibility and Management Assistance Authority (known locally as the "Control Board") and divested the home rule government of certain governmental functions.

28. In 1997, Congress divested the home rule government of almost all governmental functions remaining under control of the home rule government and placed them under the Control Board, leaving the home rule government with no actual power over almost all of the services, agencies, offices, and functions of local government in the District of Columbia.

29. Congress has also delegated to the Defendant Financial Responsibility and Management Assistance Authority (Control Board) the responsibility of making recommendations to Congress what form of government Congress might or should impose over the District of Columbia, which means over the Plaintiffs, in the future.

30. Today, the Plaintiffs are not apportioned to congressional districts, they do not vote for any member of Congress, they do not vote for any member of any state government, they do not govern the jurisdiction of their residences themselves, they are not insulated from intrusions of Congressional power in matters properly within the exclusive competence of state governments by virtue of the Tenth Amendment to the Constitution, but they are subjected to whatever laws Congress chooses to impose and they are taxed by Congress to pay for these actions.

31. Since at least 1801, when the citizens of the District of Columbia first lost their political and civil rights, the citizens of the District, including these Plaintiffs, have repeatedly and in various ways petitioned the government of the United States and its officers and divisions for redress of these and other grievances.

32. Despite their repeated and various petitions and pleas, the citizens of the District of Columbia live under more pervasive, plenary power of Congress today than did their

forebears in 1801, suffering even less freedom and democratic participation in autonomous local governments today than was the case in 1801.

33. Since the Constitution was ratified, the Congress of the United States, by legislation, has acquired and defined territories which would become States, has admitted new States, has partitioned existing single States into two States, and has ceded to States sufficient jurisdiction over places called "federal enclaves," thereby increasing the populations of the States for the purposes of apportionment in the United States Congress.

34. Since the Constitution was ratified, the Congress of the United States, by legislation, has repeatedly defined, set, increased, and reset the number of Representatives comprising the United States House of Representatives in order to guarantee to the citizens of the United States representation in the United States House of Representatives under and in conformity with the terms of Section Two of Article One, Section Four of Article Four, and the Fourteenth Amendment of the United States Constitution.

35. The District of Columbia, presently, is neither a sovereign State nor a part of a sovereign State.

36. The entire area of the District of Columbia or the entire area of the District of Columbia other than the area defined in the United States Code and in the District of Columbia Code as the "National Capital Service Area" could, as matters of law and fact, be admitted to the United States as a sovereign State or could be unified with an existing sovereign State.

COUNT ONE:
The Defendants Violate the Plaintiffs' Rights to Equal Protection of the Laws

Paragraphs 1 through 36 are incorporated by reference.

37. The Plaintiffs are entitled to all the rights in and protections of the Constitution, including the right to the equal protection of the law, also referred to as the right to equal treatment under the law.

38. Congress exercises plenary powers over places called "federal enclaves," which powers are identical in every way and degree to the plenary power Congress exercises over the District of Columbia.

39. Since the birth of the nation, Congress has assumed powers of legislation over more than five thousand federal enclaves of varying size throughout the United States.

40. According to the most recent counts, over one million citizens of the United States reside within these federal enclaves today.

41. By definition, virtually everyone living in a federal enclave hold or held some job with the federal government, exercises or exercised some role in the operations of the federal government, or is married to or is the child of someone who is or was directly involved with the federal government.

42. By definition, virtually all of the physical area of each federal enclave is devoted to and, directly or indirectly, used for the operations of the federal government.

43. For the first century and a half of the nation's life, almost all residents of the federal enclaves were subjected to the same denials of their rights as are suffered by the Plaintiffs.

44. Specifically, the residents of the federal enclaves were not apportioned to congressional districts, they did not vote for any member of Congress, they did not vote for any member of any state government, and they were excluded from all benefits of citizenship in a state, yet they were taxed by Congress to pay for these and other actions.

45. At the time the residents of the federal enclaves were subjected to these conditions, many hundreds of thousands of citizens of the United States resided within the enclaves where these conditions obtained.

46. Congress then took affirmative steps to attenuate if not terminate its exclusive jurisdiction or plenary power over all federal enclaves where any person resides.

47. Today, as a direct result of the steps Congress took, the citizens of every federal enclave are members of the political

communities of the various states in which the federal enclaves are located.

48. Today, as a direct result of the steps Congress took, the citizens of every federal enclave are apportioned representation in Congress, resulting in the participation of the citizens who reside in the federal enclaves in all acts of Congress, through elected representatives.

49. Today, as a direct result of the steps Congress took, the citizens of every federal enclave are apportioned representation in state governments, resulting in the participation of the citizens who reside in the federal enclaves in all acts of their state governments, through representatives elected by them.

50. Congress took these actions, in part, specifically, to insure that the fundamental rights of the citizens of the enclaves to participate in all relevant political processes, to be represented in their governments under the terms of the Constitution of the United States and under the terms of the Constitutions of the various States, and to have full state and federal citizenship would be respected and fulfilled.

51. The actions which Congress took out of respect for the fundamental rights of the residents of the federal enclaves were taken to bring about a specific status which the residents of the federal enclaves had stated, specifically, that they wanted.

52. In no federal enclave has Congress imposed a unique, non-republican form of government.

53. In no federal enclave does Congress prevent the residents from electing representatives to the Congress of the United States.

54. In no federal enclave does Congress rule the lives of the residents directly and intimately, without the possibility of the intervening umbrella of state governments to exercise all non-federal governmental powers.

55. In no federal enclave does Congress fence the residents out of all other rights of state and national citizenship.

56. Congress retroceded the former portion of the District of Columbia lying south-west of the Potomac River to the

State of Virginia for most of the same reasons that Congress took steps to insure that the citizens of the federal enclaves would be treated as full citizens of the states adjacent to or within which the federal enclaves are located.

57. Since 1846, the former part of the District of Columbia south-west of the Potomac River has been fully integrated into the political fabric of the State of Virginia.

58. Today, representation in Congress is apportioned to the citizens of that former part of the District of Columbia on the same basis as it is apportioned to all citizens who live within the federal enclaves, which is the same basis on which it is apportioned to all citizens of the United States other than those who reside within the District of Columbia.

59. Congress has not imposed on the former portion of the District of Columbia lying south-west of the Potomac River any of the depredations which it imposes on the remaining portion of the District of Columbia lying north-east of the Potomac River.

60. No federal interest inheres in the place of residence of any Plaintiff, such that the federal government has any reason, much less a compelling reason, to deprive any Plaintiff of any rights, much less any fundamental rights, or to treat any Plaintiff differently than it has treated the residents of the federal enclaves or the former portion of the District of Columbia lying south-west of the Potomac River, or to treat any Plaintiff differently than it treated the residents of the entire District of Columbia from 1791 until 1801.

61. No federal interest inheres in the *person* of any Plaintiff, such that the federal government has any reason, much less a compelling reason, to deprive any Plaintiff of any rights, much less any fundamental rights, or to treat any Plaintiff differently than it has treated the residents of the federal enclaves or of the former portion of the District of Columbia lying south-west of the Potomac River, or to treat any Plaintiff differently than it treated the residents of the entire District of Columbia from 1791 until 1801.

62. No governmental purpose whatsoever is served by excluding any Plaintiff from participation in the government of

the United States through elected representatives.

63. No governmental purpose whatsoever is served by subjecting any Plaintiff to unfettered governmental control by the Congress of the United States.

64. No governmental purpose whatsoever is served by denying any Plaintiff the benefits of a state government insulated from Congressional interference in matters properly within the exclusive competence of state governments as evidenced by the Tenth Amendment to the Constitution.

65. It is within the power of Congress and Defendants Clinton, Carle, and Livingood to treat the Plaintiffs in a manner identical to that manner with which these Defendants treat the citizens of the federal enclaves and the citizens of the former portion of the District of Columbia south-west of the Potomac River.

66. Despite the fact that there is no reason whatsoever, much less any compelling reason, to treat the Plaintiffs any differently from the treatment accorded to all residents of the federal enclaves, the Plaintiffs' fundamental political and civil rights are denied, while the rights of the residents of the former federal enclaves are respected and they are treated as citizens of states and of the nation.

67. Despite the fact that there is no reason whatsoever, much less any compelling reason, to treat the Plaintiffs any differently from the treatment accorded to all residents of the former portion of the District of Columbia lying south-west of the Potomac River and now in the State of Virginia, the Plaintiffs' fundamental political and civil rights are denied, while the rights of the residents of the former portion of the District of Columbia lying south-west of the Potomac River and now in the State of Virginia are respected and they are treated as citizens of the State of Virginia and of the nation.

68. Despite the fact that there is no reason whatsoever, much less any compelling reason, to treat the Plaintiffs any differently from the treatment accorded to all other citizens of the United States, the Congress of the United States has fenced the residents of the District of Columbia out of all apportionments for representation in a congressional district

or districts, although Congress has taken steps to include in congressional apportionments all formerly excluded citizens of the federal enclaves and all formerly excluded citizens of the former portion of the District of Columbia south-west of the Potomac River.

69. These actions of Congress violate the Plaintiffs' rights to the equal protection of the laws under the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

70. Specifically, the Congress of the United States, with the assistance of Defendant William Jefferson Clinton in his official capacity as the President of the United States, has imposed Defendant District of Columbia Financial Responsibility and Management Assistance Authority upon the District of Columbia, burdening the Plaintiffs, yet the Congress and the Defendant have not imposed a similar agent or instrumentality upon any federal enclave or upon the former part of the District of Columbia lying south-west of the Potomac River, which actions of the Congress and all the Defendants violate the Plaintiffs' rights to the equal protection of the laws under the Due Process Clause of the Fifth Amendment to the Constitution of the United States of America.

71. Specifically, Defendant District of Columbia Financial Responsibility and Management Assistance Authority is directed solely at the citizens of the District of Columbia, which includes the Plaintiffs, and is not directed at any resident of any federal enclave, preventing the Plaintiffs from electing representatives to Congress having full powers and rights under the Constitution, preventing them from enjoying the benefits of citizenship in a state, and trenching on other fundamental constitutional rights, which actions of the Defendant violate the Plaintiffs' rights to the equal protection of the laws under the Due Process Clause of the Fifth Amendment to the Constitution of the United States of America.

72. Defendant William Jefferson Clinton in his official capacity as the President of the United States has ratified,

approved, implemented, and enforced Acts, Mandates, and resolutions of Congress which are directed solely at the citizens of the District of Columbia, which includes the Plaintiffs, and which are not directed at any resident of any federal enclave, preventing the Plaintiffs from electing representatives to Congress having full powers and rights under the Constitution, preventing them from enjoying the benefits of citizenship in a state, and trenching on other fundamental constitutional rights.

73. These actions of Defendant William Jefferson Clinton in his official capacity as President of the United States violate the Plaintiffs' rights to the equal protection of the laws under the Due Process Clause of the Fifth Amendment to the Constitution of the United States of America.

74. Specifically, Defendant William Jefferson Clinton in his official capacity as the President of the United States has transmitted to Congress the results of decennial censuses of the population of the United States, specifying therewith the numbers of Representatives to be apportioned to each State.

75. Specifically, Defendant Clinton's calculations have accounted for and included the entire populations of all federal enclaves and of the former portion of the District of Columbia lying south-west of the Potomac River.

76. Specifically, such inclusions are for the purpose of apportionment of representation in the United States House of Representatives, under the terms of Article One and Amendment Fourteen of the Constitution of the United States, to the citizens of the federal enclaves and to the citizens of former portion of the District of Columbia south-west of the Potomac River.

77. Specifically, Defendant Clinton's calculations have not accounted for and included the population of the District of Columbia for the purpose of apportionment, under the terms of Article One and Amendment Fourteen of the Constitution of the United States, of representation in the United States House of Representatives.

78. Specifically, these actions of Defendant William Jefferson Clinton in his official capacity as President of the

United States violate the Plaintiffs' rights to the equal protection of the laws under the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

79. Specifically, Defendant Robin H. Carle in her official capacity as the Clerk of the United States House of Representatives has certified to the chief executive of each State the number of Representatives apportioned to the State, which apportionments have included the populations of all federal enclaves and of the former portion of the District of Columbia south-west of the Potomac River.

80. Specifically, the apportionments certified by Defendant Carle have not accounted for and included the population of the District of Columbia and no representation under the terms of Article One and Amendment Fourteen of the Constitution of the United States has been apportioned to the District of Columbia in the Defendant's certifications.

81. Specifically, Defendant Robin H. Carle in her official capacity as the Clerk of the United States House of Representatives has enrolled Representatives whose credentials show that they were elected in accordance with the laws of the United States, specifically in accordance with the apportionments to the States previously certified by the Defendant.

82. Specifically, Defendant Carle's Rolls include representatives elected from congressional districts which include the populations of all federal enclaves and from the congressional district including the former portion of the District of Columbia south-west of the Potomac River.

83. Specifically, Defendant Carle's enrollments have not included representatives of the citizens of the District of Columbia, serving under the terms of Article One and Amendment Fourteen of the Constitution of the United States or otherwise.

84. Specifically, these actions of Defendant Robin H. Carle in her official capacity as the Clerk of the United States House of Representatives violate the Plaintiffs' rights to the equal protection of the laws under the Due Process Clause of the Fifth Amendment to the Constitution of the United States of

America.

85. Specifically, Defendant Wilson Livingood in his official capacity as the Sergeant at Arms of the United States House of Representatives has admitted to the Hall of the House for sessions of the House Representatives on the Rolls of Defendant Robin H. Carle in her official capacity as the Clerk of the United States House of Representatives.

86. Specifically, Defendant Livingood has enforced Rolls which have included Representatives elected from congressional districts which include the populations of all federal enclaves and from the congressional district including the former portion of the District of Columbia south-west of the Potomac River, but which Rolls have not included representatives of the District of Columbia under the terms of Article One and Amendment Fourteen of the Constitution of the United States.

87. Specifically, these actions of Defendant Wilson Livingood in his official capacity as the Sergeant at Arms of the United States House of Representatives violate the Plaintiffs' rights to the equal protection of the laws under the Due Process Clause of the Fifth Amendment to the Constitution of the United States of America.

COUNT TWO:
The Defendants Violate the Plaintiffs' Rights to Republican Forms of Government and Violate the Plaintiffs' Privileges to Rely upon the Defendants' Obligation to Guarantee to All Citizens Republican Forms of Government

Paragraphs 1 through 36 are incorporated by reference.

88. The Plaintiffs are entitled to all the rights and privileges in and protections of the Constitution, including the right to republican forms of government and including the privilege of relying upon the obligation of all members of the federal government to guarantee to them republican forms of government.

89. The Plaintiffs are entitled to other fundamental rights and privileges to participate in the political process, to be

represented in government, to vote, to run for office, to have full state and federal citizenship, which rights and privileges are also inferred under the right to enjoy republican forms of government and under the privilege of relying upon the obligation of all members of the federal government to guarantee to them republican forms of government.

90. The Plaintiffs are entitled to the right to a state government insulated from Congressional interference in matters properly within the exclusive competence of state governments generally, as evidenced by the Tenth Amendment to the Constitution, which right is inferred under the right to enjoy republican forms of government and under the privilege of relying upon the obligation of all members of the federal government to guarantee to them republican forms of government.

91. The home rule government (comprised of the Council of the District of Columbia, the Mayor of the District of Columbia, and the various administrative departments) does not constitute a republican form of government, because every action of the home rule government is subject to absolute review and veto by the Congress of the United States itself or by Defendant District of Columbia Financial Responsibility and Management Assistance Authority acting as an administrative agent or instrumentality for the Congress of the United States of America and because the home rule government was created by an act of Congress and not by an autonomous act of the citizens of the District of Columbia and because the Congress of the United States holds the exclusive power to alter or abolish the home rule government at any time.

92. The Congress of the United States, when it exercises any power of government over or concerning the District of Columbia, is not a republican form of government, because the Congress of the United States is not elected by the citizens of the District of Columbia.

93. The Defendant District of Columbia Financial Responsibility and Management Assistance Authority is not a republican form of government because it was not elected by

the citizens of the District of Columbia, because it is not subject to their control, and because it was created by the Congress of the United States and is subject always to the power and control of the Congress of the United States.

94. Defendants William Jefferson Clinton in his official capacity as the President of the United States, Robin H. Carle in her official capacity as the Clerk of the United States House of Representatives, and Wilson Livingood in his official capacity as the Sergeant at Arms of the United States House of Representatives are all officers and agents of the government of the United States, since their powers arises directly from the Constitution of the United States or from Acts of Congress under powers presumed to arise directly from the Constitution.

95. Defendant District of Columbia Financial Responsibility and Management Assistance Authority is an agent or instrumentality of the federal government, since it was created by an Act of Congress under powers purported to arise from the Constitution of the United States and all power it exercises follows only from Acts of Congress.

96. Therefore, all Defendants are obligated to guarantee to the Plaintiffs republican forms of government.

97. It is within the powers of the Congress and Defendants Clinton, Carle, Livingood, and District of Columbia Financial Responsibility and Management Assistance Authority to take steps to guarantee republican forms of government to the Plaintiffs.

98. All Defendants, however, in their various offices and through their enforcement of or compliance with various Acts, Resolutions, or mandates of Congress and by acts of their own in their official capacities, actively prevent institution of any republican form of government specifically for or over the District of Columbia.

99. A republican form of government specifically for or over the District of Columbia would be a government elected by the citizens of the District of Columbia, including by the Plaintiffs, as the citizens of a state or as the citizens of a portion of a state.

100. All Defendants, in their various offices and through their enforcement of or compliance with various Acts, Resolutions, or mandates of Congress and by acts of their own in their official capacities, actively prevent participation of the citizens of the District of Columbia, including the Plaintiffs, in the Congress of the United States by elected representatives, serving under the terms of Article One and Amendment Fourteen of the Constitution of the United States.

101. The Plaintiffs could participate in the Congress of the United States by elected representatives, serving under the terms of Article One and Amendment Fourteen of the Constitution of the United States, if the District of Columbia were a state or a part of a state.

102. If the Plaintiffs participated in the Congress of the United States by elected representatives, the Congress of the United States would be, in relation to the District of Columbia, republican form of government.

103. These actions of the Defendants and of Congress, generally, violate the Plaintiffs' rights to republican forms of government under the first Clause of the fourth Section of Article Four of the Constitution of the United States of America.

104. These actions of the Defendants and of Congress, generally, violate the Plaintiffs' privilege of relying upon the obligation of all members of the federal government to guarantee to them republican forms of government.

105. The Congress of the United States, with the assistance and efforts of the Defendants, has not apportioned representation in Congress to the citizens of the District of Columbia.

106. The Congress of the United States, with the assistance and efforts of the Defendants and others, could apportion to the citizens of the District of Columbia, including the Plaintiffs, representation in the Congress of the United States under the terms of Article One and Amendment Fourteen of the Constitution of the United States if the District of Columbia were a sovereign state or a part of a sovereign state.

107. These actions of the Defendants and of Congress violate the Plaintiffs' rights to republican forms of government under the first Clause of the fourth Section of Article Four of the Constitution of the United States of America.

108. These actions of the Defendants and of Congress violate the Plaintiffs' privilege of relying upon the obligation of all members of the federal government to guarantee to them republican forms of government.

109. The Congress of the United States, with the assistance and efforts of the Defendants, has prevented the Plaintiffs from enjoying the benefits of a state government, insulated from Congressional interference in matters of local concern by virtue of the enumerations of power in Section 8 of Article I of the Constitution and as evidenced by the Tenth Amendment to the Constitution.

110. These actions of Congress and of the Defendants violate the Plaintiffs' rights to republican forms of government under the first Clause of the fourth Section of Article Four of the Constitution of the United States of America.

111. These actions of Congress and of the Defendants violate the Plaintiffs' privilege of relying upon the obligation of all members of the federal government to guarantee to them republican forms of government.

112. Specifically, Defendant William Jefferson Clinton in his official capacity as the President of the United States has ratified, approved, implemented, and enforced Acts, Mandates, and resolutions of Congress, which are antithetical to the principles of a republican form of government and all of which acts directly oppose and prevent the Plaintiffs from enjoying republican forms of government.

113. Specifically, Defendant William Jefferson Clinton in his official capacity as The President of the United States has transmitted to the Congress the results of decennial censuses of the population of the United States, including the numbers of Representatives to be apportioned to each State, which apportionments have not included apportionments of representation to the District of Columbia under the terms of Section Two of Article One, Section Four of Article Four, and

the Fourteenth Amendment of the United States Constitution.

114. Specifically, Defendant Robin H. Carle in her official capacity as the Clerk of the United States House of Representatives has certified to the chief executive of each State the number of Representatives apportioned to the State, which apportionments have not included apportionments of representation to the District of Columbia under the terms of Section Two of Article One, Section Four of Article Four, and the Fourteenth Amendment of the United States Constitution.

115. Specifically, Defendant Robin H. Carle in her official capacity as the Clerk of the United States House of Representatives has enrolled Representatives whose credentials show that they were elected in accordance with the laws of the United States, but the Defendant's Rolls have not included representatives of the District of Columbia under the terms of Section Two of Article One, Section Four of Article Four, and the Fourteenth Amendment of the United States Constitution.

116. Specifically, Defendant Wilson Livingood in his official capacity as the Sergeant at Arms of the United States House of Representatives has admitted Representatives on the Rolls of Defendant Robin H. Carle in her official capacity as the Clerk of the United States House of Representatives, which Rolls have not included representatives of the District of Columbia under the terms of Section Two of Article One, Section Four of Article Four, and the Fourteenth Amendment of the United States Constitution.

117. These specific actions of the Defendants violate the Plaintiffs' rights to republican forms of government under the first Clause of the fourth Section of Article Four of the Constitution of the United States of America.

118. These specific actions of the Defendants violate the Plaintiffs' privilege of relying upon the obligation of all members of the federal government to guarantee to them republican forms of government.

Relief Sought

Therefore, in light of the facts stated herein and because the Plaintiffs have no alternative avenue for relief from these injuries than through this court, the Plaintiffs respectfully ask this honorable Court to set this matter for trial before a jury of the Plaintiffs' peers, and thereupon:

A. To issue declaratory judgments that:

1. The Plaintiffs and all citizens of the District of Columbia have the right to the equal protection of the laws, also expressed as the right to stand on an equal footing with all other citizens of the United States, and

2. The Plaintiffs and all citizens of the District of Columbia have the right to enjoy republican forms of government, such as are inherent in a federal system, which means that:

   a. The citizens of the District of Columbia have the right to be apportioned to a congressional district or districts, such that they will participate in the government of the United States through duly elected representatives to the United States House of Representatives and therefore as well through duly elected representatives to the United States Senate, having powers and privileges identical to those of all other members of Congress, and that

   b. The citizens of the District have the right to participate through duly elected representatives in a state government insulated from Congressional interference in matters properly within the exclusive competence of state governments, as evidenced by the Tenth Amendment to the Constitution, and

3. The Plaintiffs and all citizens of the District of Columbia have the privilege of relying upon the obligation of all branches, officers, agents, and instrumentalities of the

federal government to guarantee republican forms of government to them, which obligation "to guarantee" means taking overt steps forthwith to enable, facilitate, and apportion representation in such governments;

B. *To issue further declaratory judgments that:*

1. Imposition of the District of Columbia Financial Responsibility and Management Assistance Authority and the imposition by the Congress of the United States of other instrumentalities and actions uniquely concerning the District of Columbia violates the Plaintiffs' rights to the equal protection of the laws under the United States Constitution by treating the residents of the District of Columbia differently than the residents of the federal enclaves, by treating the residents of the District of Columbia differently than the residents of the former portion of the District south-west of the Potomac River and now in Virginia, and by treating the residents of the District of Columbia differently than the residents of the United States outside the District of Columbia, and

2. The failure of the Congress of the United States to apportion the citizens of the District of Columbia to a congressional district or districts, in accord with their expressed wishes and under the terms of Section Two of Article One and the Fourteenth Amendment of the United States Constitution, after taking steps to insure that the citizens of the federal enclaves and the citizens of the former portion of the District of Columbia south-west of the Potomac River have been apportioned to congressional districts, violates the Plaintiffs' rights to the equal protection of the laws under the United States Constitution, and

3. Imposition of the District of Columbia Financial Responsibility and Management Assistance Authority and the imposition by the Congress of the United States of other instrumentalities and actions uniquely

concerning the District of Columbia violates the Plaintiffs' rights to republican forms of government under the first Clause of the fourth Section of Article Four of the Constitution of the United States of America and violates the Plaintiffs' privilege of relying upon the obligation of all members of the federal government to guarantee to them republican forms of government, and

4. The failure of the Congress of the United States to take steps to insure that the citizens of the District of Columbia will be apportioned to congressional districts in accord with their expressed wishes violates the Plaintiffs' rights to republican forms of government under the first Clause of the fourth Section of Article Four of the Constitution of the United States of America and violates the Plaintiffs' privilege of relying upon the obligation of all members of the federal government to guarantee to them republican forms of government;

C. To issue mandatory and perpetual injunctions directed to and with the effect that:

1a. Defendant William Jefferson Clinton in his official capacity as The President of the United States and his successors and assigns shall not approve, ratify, implement, or enforce any Act, Resolution, or mandate of Congress (1) which applies to the District of Columbia *and* (2) which does not immediately apply in real terms (determined by whether any action, behavior, or expenditure of money is changed or affected) to the entire United States, *and* (3) which has not been *previously* ratified by the citizens of the District of Columbia by direct vote or by vote of their then elected representatives in the interim home rule government, effective until such time as the District of Columbia (or all the District of Columbia other than the National Capital Service Area as defined in the United States Code on the date this suite was filed) is admitted as a sovereign State on equal footing with all other sovereign States of the

United States of America or until such time as the District of Columbia (or all the District of Columbia other than the National Capital Service Area as defined in federal law on the date this suite was filed) is unified with a previously-existing sovereign State of the United States of America, on an equal footing with all other jurisdictions of that State, the choice among these alternatives to be solely decided by the citizens of the District of Columbia,

1b. Defendant William Jefferson Clinton in his official capacity as The President of the United States and his successors and assigns shall not transmit to the Congress, on the basis of the decennial census or other enumeration, any number of Representatives to be apportioned to each State other than the minimum number of Representatives to which each State is entitled under Section Two of Article One of the Constitution of the United States, which number is one, until such time as the District of Columbia (or all the District of Columbia other than the National Capital Service Area as defined in the United States Code on the date this suite was filed) is admitted as a sovereign State on equal footing with all other sovereign States of the United States of America or until such time as the District of Columbia (or all the District of Columbia other than the National Capital Service Area as defined in federal law on the date this suite was filed) is unified with a previously-existing sovereign State of the United States of America, on an equal footing with all other jurisdictions of that State, the choice among these alternatives to be solely decided by the citizens of the District of Columbia,

2a. Defendant Robin H. Carle in her official capacity as the Clerk of the United States House of Representatives shall not certify to any State any number of Representatives apportioned to the State

other than the minimum number of Representatives to which each State is entitled under Section Two of Article One of the Constitution of the United States, which number is one, until such time as the District of Columbia (or all the District of Columbia other than the National Capital Service Area as defined in the United States Code on the date this suite was filed) is admitted as a sovereign State on equal footing with all other sovereign States of the United States of America or until such time as the District of Columbia (or all the District of Columbia other than the National Capital Service Area as defined in federal law on the date this suite was filed) is unified with a previously-existing sovereign State of the United States of America, on an equal footing with all other jurisdictions of that State, the choice among these alternatives to be solely decided by the citizens of the District of Columbia,

2b. Defendant Robin H. Carle in her official capacity as the Clerk of the United States House of Representatives shall not enroll as members of the House of Representatives any more than the minimum number of Representatives to which each State is entitled under Section Two of Article One of the Constitution of the United States, which number is one member per State, until such time as the District of Columbia (or all the District of Columbia other than the National Capital Service Area as defined in the United States Code on the date this suite was filed) is admitted as a sovereign State on equal footing with all other sovereign States of the United States of America or until such time as the District of Columbia (or all the District of Columbia other than the National Capital Service Area as defined in federal law on the date this suite was filed) is unified with a previously-existing sovereign State of the United States of America, on an equal footing with all other jurisdictions of that State, the

choice among these alternatives to be solely decided by the citizens of the District of Columbia,

3. Defendant Wilson Livingood in his official capacity as the Sergeant at Arms of the United States House of Representatives shall not admit to the Hall of the House of Representatives for sessions of the House any more than the minimum number of Representatives to which each State is entitled under Section Two of Article One of the Constitution of the United States, which number is one member per State, until such time as the District of Columbia (or all the District of Columbia other than the National Capital Service Area as defined in the United States Code on the date this suite was filed) is admitted as a sovereign State on equal footing with all other sovereign States of the United States of America or until such time as the District of Columbia (or all the District of Columbia other than the National Capital Service Area as defined in federal law on the date this suite was filed) is unified with a previously-existing sovereign State of the United States of America, on an equal footing with all other jurisdictions of that State, the choice among these alternatives to be solely decided by the citizens of the District of Columbia;

4. The Defendant District of Columbia Financial Responsibility and Management Assistance Authority shall take no further action or enter any further orders or directives concerning the District of Columbia, shall surrender all records to the government created by the Home Rule Act, shall offer to convey to the home rule government the contracts and services of all persons employed or contracted for services by the Defendant, and shall disband itself, leaving the government of the District of Columbia to the home rule government serving as an interim government of the District of Columbia to facilitate transition of the District of Columbia to the status of sovereign State or to unification with an existing sovereign State, the choice

between these alternatives to be solely decided by the citizens of the District of Columbia.

D. To award to the Plaintiffs all costs and reasonable attorneys' fees and expenses of this suit; and

E. To issue such other, additional relief as appropriate.

Respectfully submitted,
S/ George S. LaRoche,
counsel for all Plaintiffs
D.C. Bar number 421991
1 Valley View Avenue
Takoma Park, MD 20912
301-891-3857

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LOIS E. ADAMS, *et al.*, Plaintiffs, v. WILLIAM JEFFERSON CLINTON, *et al.*, Defendants.	Civ. No. 98–1665 (LFO)
CLIFFORD ALEXANDER, *et al.*, Plaintiffs, v. WILLIAM M. DALEY, *et al.*, Defendants.	Civ. No. 98–2187 (LFO)

FILED
Nov[ember] 6, 1998
Nancy Mayer-Whittington, Clerk
U.S. District Court

REQUEST FOR DESIGNATION
OF A THREE-JUDGE COURT

TO THE HONORABLE HARRY T. EDWARDS, CHIEF JUDGE OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT:

For the reasons stated in an accompanying memorandum, it is hereby respectfully requested, pursuant to the provisions of 28 U.S.C. § 2284, that you designate two judges in addition to myself to participate in hearing and determining the plaintiffs' complaints for injunctive and declaratory relief.

S/ Louis F. Oberdorfer
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LOIS E. ADAMS, *et al.*, Plaintiffs, v. WILLIAM JEFFERSON CLINTON, *et al.*, Defendants.	Civ. No. 98–1665 (LFO)
CLIFFORD ALEXANDER, *et al.*, Plaintiffs, v. WILLIAM M. DALEY, *et al.*, Defendants.	Civ. No. 98–2187 (LFO)

FILED
Nov[ember] 6, 1998
Nancy Mayer-Whittington, Clerk
U.S. District Court

MEMORANDUM

Two complaints filed by two sets of residents of the District of Columbia allege that Congress has unconstitutionally excluded them from apportionment to a congressional district. Orders entered November 3, 1998, consolidated the cases. Preliminarily, both sets of plaintiffs request that their cases be set before a three-judge district court in the manner contemplated by 28 U.S.C. § 2284(b) (1). That statute requires the convening of such a court "when an action is filed challenging the constitutionality of the apportionment of congressional districts." 28 U.S.C. § 2284(a). Whether a three-judge court is called for turns on: "(1) whether the complaint formally alleges a basis for equitable relief; (2) whether the constitutional question presented is substantial; and (3) whether the case presented otherwise comes within the requirements of the . . . three-judge statute." Police Officers

Guild, Nat'l Union of Police Officers v. Washington, 369 F. Supp. 543, 548-49 (D.D.C. 1973).

I.

The defendants named in the complaint in Adams v. Clinton include the President, ministerial officials of the House of Representatives, and the District of Columbia Financial Responsibility and Management Assistance Authority. The President and the House officials are alleged to have a role in effecting periodic apportionments to congressional districts as contemplated by Article I, § 2, cl. 3, of the Constitution; the Adams complaint seeks to enjoin their execution of any further apportionment until Congress has cured the claimed violations of plaintiffs' alleged constitutional rights. In addition, the Adams plaintiffs seek declarations that the present apportionments denying them representation in Congress violate their constitutional rights to a republican form of government and to the equal protection of the laws, as guaranteed by Article IV, 6 §, and § 1 of the Fourteenth Amendment. These substantive complaints and plaintiffs' prayers for relief allege bases for equitable relief (which may or may not be granted) that clearly satisfy the first prong of the Police Officers Guild syllogism.

II.

Whether either constitutional question is substantial presents a more difficult problem. It is plaintiffs' contention, essentially, that the results of the reapportionment process, mandated by Congress in lieu of decennial reapportionment legislation, see Franklin v. Massachusetts, 505 U.S. 788, 791-92 (1992), violate Congress' constitutional apportionment obligation. The process does not merely provide plaintiffs with disproportionate representation in Congress; it provides no representation – zero. Compare Board of Estimate of New York v. Morris, 489 U.S. 688, 702 (1989) with Swann v. Adams, 385 U.S. 440 (1967). Thus, plaintiffs argue that the apportionment process deprives them of a republican form of government because it leaves them unrepresented in the

legislative body (Congress) authorized by the Constitution "[t]o exercise exclusive Legislation in all Cases whatsoever" involving them and the political subdivision in which they reside, the District of Columbia. U.S. Const. art. I, § 8, cl. 17. Plaintiffs also claim that they are denied the equal protection of the laws because District residents, who are subject to Congress' "exclusive" legislative power, are not represented in Congress, while residents of former federal enclaves and other sites over which Congress is empowered to "exercise like Authority" are. Id. (defining other sites as "Forts, Magazines, Arsenals, dock Yards, and other needful Buildings," e.g., the Bethesda Naval Hospital Complex).

A constitutionally insubstantial claim, for three-judge .court purposes, has been authoritatively described as "essentially fictitious," "wholly insubstantial," "obviously frivolous," and "obviously without merit," words that "[i]n the context of prior [Supreme Court] decisions . . . import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous . . . ." Goosby v. Osser, 409 U.S. 512, 518 (1973) (citations omitted) (emphasis added); see also Washington v. Confederated Tribes, 447 U.S. 134, 147-48 (1980); LaRouche v. Fowler, 152 F.3d 974, 98283, 986 (D.C. Cir. 1998).

While plaintiffs cite no cases that embrace their theories, they emphasize that their claims raise original issues that have textual and tangential decisional support. For example, in another context they point to the following statement of the Supreme Court in Board of Estimate of New York v. Morris: "[I]n this country the people govern themselves through their elected representatives and . . . each and every citizen has an inalienable right to full and effective participation in the political processes of the legislative bodies of the [n]ation, [s]tate, [and] locality . . . ." 489 U.S. at 693 (citations omitted).

Plaintiffs also confront dictum of the D.C. Court of Appeals that the Guarantee Clause "applies to the states and cannot be read to restrict the power of Congress to legislate for the District." Darby v. United States, 681 A.2d 1156, 1158 (D.C. 1996), cert. denied, 117 S. Ct. 596 (1997). Plaintiffs argue,

however, that a D.C. Court of Appeals decision is not preclusive, that its dictum is supported by no relevant Supreme Court authority, and that the issue in Darby about jurisdiction of the D.C. courts involved a quite different question from those posed here. It appears that no case binding on this court resolves the question whether, in the context here, the District may or should be treated as State for the purpose of Article 4, § 4. Cf. District of Columbia v. Carter, 609 U.S. 418, 420, 93 S. Ct. 602, 604 (1973).

The plaintiffs contend that no court has ruled authoritatively on the question whether a republican form of government, as that term is used in the Constitution, is denied to other persons unrepresented in the body that has authority "[t]o exercise exclusive Legislation . . . over" them and the District in which they live. Article IV, § 4, obligates "[t]he United States" (not just the Congress) to "guarantee to every State . . . a Republican Form of Government, and [to] protect each of them against Invasion . . . and . . . against domestic Violence." If, as it seems apparent, Article IV, § 4, obligates the United States to afford the District and its residents the same protection from "Invasion" and "domestic Violence" as is enjoyed by the several states and their residents, it may follow that, to the extent, if any, that Article IV guarantees to the states and their residents a republican form of government vis-a-vis the legislature that governs them, the District and its residents are entitled to the same guarantee -- irrespective of whether the District is a State for the purpose of the Guarantee Clause. The plaintiffs' claims are not rendered "obviously without merit" by cases suggesting that the Guarantee Clause necessarily involved a political question. See New York v. United States, 505 U.S. 144, 183-86, 112 S. Ct. 2408, 2432-33 (1992).

Further, it is not obvious that plaintiffs' equal protection claim is frivolous. The mere fact that plaintiffs are not challenging a statute that draws explicit distinctions between the District of Columbia and other federal enclaves with respect to apportionment does not establish conclusively that they are not challenging an arguably discriminatory distinction

drawn by Congress and affected by the apportionment process conducted periodically by defendants. Therefore the equal protection claim is not obviously without merit.

Then there is the Twenty-third Amendment, § 1 of which states:

> The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:
> A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

(emphasis added). It could be argued that the plaintiffs' claims would mean that the Twenty-third Amendment was superfluous. Cf. Hobson v. Tobriner, 255 F. Supp. 295, 300 (D.D.C. 1966); Adam H. Kurland, Partisan Rhetoric, Constitutional Reality, and Political Responsibility: The Troubling Constitutional Consequences of Achieving D.C. Statehood by Simple Legislation, 60 Geo. Wash. L. Rev. 475 (1992). While this might be a significant issue in resolving the merits, it cannot be decisive at this stage. Constitutional interpretation that renders a provision of the Constitution superfluous may be disfavored, but it does not make the proposed interpretation patently frivolous. See, e.g., United States v. Stanley, 483 U.S. 669, 682 n.6, 107 S. Ct. 3054, 3063 n. 6 (1987); Sanford Levinson, Accounting for Constitutional Change, 8 Const. Commentary 409, 422-28 (1991).

Or perhaps the language of the Amendment underscored above dooms the plaintiffs' allegations: it seems to imply that the District is not entitled to representation in Congress. But the implication is not strong enough to extinguish the plaintiffs' claims at the threshold of their suits. If the

Constitution entitled the District to voting representation in Congress before the Twenty-third Amendment, the underscored language did not unquestionably work a repeal. If the Constitution did not entitle the District to voting representation in Congress prior to the Amendment, the Amendment is irrelevant to the analysis -- no one is arguing that it created such an entitlement. And there does not seem to be evidence that the Twenty-third Amendment was intended to resolve ambiguity about the right of District citizens to vote in Congress. See David E. Kyvig, Explicit & Authentic Acts. Amendment the U.S. Constitution 1776-1995, at 352-55 (1996). The language of the Twenty-third Amendment very likely reflects the assumption that District citizens had no right to elect voting members of Congress. See H. Rep. No. 86-1698, at 2-3, reprinted in 1960 U.S.C.C.A.N. 1459, 1460-61. But the assumptions of the participants in the drafting and ratifying of the Twenty-third Amendment do not necessarily indicate the proper interpretation of constitutional provisions adopted by the Founders. In addition, the underscored language appears to have been chosen merely to conform closely to the formulation of Article II, § 1 -- "Each State shall appoint . . . a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in Congress" -- rather than to affect the right to elect voting members of Congress. See H.R. Rep. No. 86-1698, at 4 (1960), reprinted in 1960 U.S.C.C.N. 1459, 1462.

Even if there is some apparent tension between the Twenty third Amendment and Article 4, § 4, that would not render the plaintiffs' claims wholly insubstantial. If essence of the ideal republican form of government is the right to representation in the governing legislature, see. e.g., 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 328 (Jonathan Elliot ed., 2d ed. 1836) ("A republic, where the people at large, either collectively or by representation, form the legislature.") (speech of Charles Pickney, S.C.); cf. The Federalist No. 71, at 483 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("The tendency of the legislative authority to absorb every other, has been fully

displayed and illustrated by examples . . . . In governments purely republican, this tendency is almost irresistible.") (emphasis added), then the Twenty-third Amendment's establishment of a right to a voice in the selection of the President and Vice-President, as distinguished from the national legislature, would be essentially outside the domain of the Guarantee Clause. So the Twenty-third Amendment may have been necessary because it provided a right to elect a President, not the Fourteenth Amendment guarantee of a republican form of government.

The plaintiffs' claims also cannot be dismissed out of hand on the basis of the failure of the several states to ratify a proposed constitutional amendment stating that the District would be treated as a State "for purposes of representation in Congress." H.R.J. Res. 554, § 1, 95th Cong. (1978); see H.R. Rep. No. 95-886 (1978). The proposed amendment received the support of two-thirds of the members of the House and of the Senate, but was ratified by only 16 states – much fewer than the 38 required – during the period provided for ratification. See Kyvig, supra, at 420-25. Although the congressional proponents of the proposed amendment maintained that "[i]f the citizens of the District are to have voting representation in..the Congress, a constitutional amendment is essential," H.R. Rep. No. 95-886, at 4, a failed constitutional amendment does not alter the meaning of the Constitution, and the views of a failed amendment's congressional supporters have no well-established significance.

Plaintiffs theories are unique. They may well founder, for example, on the specific reference to "states" in the relevant constitutional clauses, the structure of the Constitution, or the Congress' exclusive legislative authority over the District of Columbia. The issues that they raise also may turn out to be non-justiciable political questions, even though the concept of justiciability is becoming murkier and murkier. See United States House of Representatives v. United States Dep't of Commerce. et al., No. 98-0456, 1998 U.S. Diet. LEXIS 13133 at *31, 57-61 (D.D.C. Aug. 24, 1998). Nonetheless, the claims

plaintiffs present are sufficiently tenable to justify reference of the case to a three-judge district court.

III.

Finally, plaintiffs argue that this case "comes within the requirements of the . . . three-judge statute," and therefore satisfies the third prong of the Police Officers Guild standard. 369 F. Supp. at 548-49. That statute, to reiterate, calls for a three-judge court when a case challenges "the constitutionality of the apportionment of congressional districts." 28 U.S.C. § 2284(a). For the purpose of this statute, apportionment means the allocation of congressional districts "among units entitled to representation." Black's Law Dictionary 99 (6th ed. 1990). Defendants are correct that the District of Columbia is not apportioned a congressional district under the current apportionment scheme. The District's exclusion from apportionment, however, does not mean necessarily that plaintiffs' case does not challenge the constitutionality of the apportionment of congressional districts. In fact, such exclusion, and plaintiffs' prayer for a declaration that the District cannot constitutionally be left out of the apportionment process, indicate that the core of plaintiffs' case is a challenge to the apportionment of congressional districts. It seems clear that an apportionment that, for example, allocated no representatives at all to Alaska could be challenged under § 2284(a). It would be odd if a plaintiff could invoke § 2284(a) where a state was allocated some fraction of the districts to which it were entitled, unless it were allocated no districts at all. Admittedly, it would not be absurd if § 2284(a) operated that way. The Constitution explicitly requires that "each state shall have at least one representative." Art. I, § 2, cl. That explicit constitutional directive might have prompted Congress to distinguish between an allocation of no representatives and any other allocation of too few districts. But the plain language of § 2284(a) does not reflect such a distinction. In fact, there is no evidence that Congress made that distinction. The case law that defendants invoke, see. e.g., City of Philadelphia v.

Klutznick, 503 F. Supp. 657, 658 (E.D. Pa. 1980) (denying application for three-judge court because "[n]o existing apportionment is challenged here"); Federation of American Immigration Reform v. Klutznick, 486 F. Supp. 564, 577 (D.D.C. 1980), does not prove otherwise. In Philadelphia, the city of brotherly love was not complaining about the number of congressional districts allocated to the Commonwealth of Pennsylvania or to the city; it was concerned about census practices that might affect a future allocation. The situation in FAIR was similar: the court concluded that plaintiffs were simply "challeng[ing] . . . census practices potentially affecting allocations of House members to states," 484 F. Supp. 577 (emphasis added), rather than an existing allocation. These plaintiffs, in contrast, do challenge their existing allocation of zero representatives. Accordingly, the third prong of the Police Officers Guild standard is satisfied.

IV.

Although the details of their arguments differ on some points, both sets of plaintiffs base their claims on equal protection and a guaranteed right to a republican form of government. The plaintiffs in Alexander v. Daley advance additional constitutional arguments. And the Alexander complaint, unlike the Adams complaint, maintains that the constitution entitled citizens of the District to voting representation in the United States Senate. Since the intersection of the two cases falls within the scope of 28 U.S.C. § 2284(a), it is not necessary to discuss the details of the additional theories of the Alexander plaintiffs at this time. Cf. 22 Moore's Federal Practice § 404.02[2] [d] [i] (3d ed. 1998) (noting three-judge court has discretion to retain jurisdiction of non three-judge claims).

For all the reasons discussed above, the Chief Judge of this Circuit is requested to assign two other judges to participate in hearing and determining the plaintiffs' complaints for injunctive and declaratory relief.

S/ Louis F. Oberdorfer
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LOIS E. ADAMS, *et al.*, Plaintiffs, v. WILLIAM JEFFERSON CLINTON, *et al.*, Defendants.	)	Civ. No. 98–1665 (LFO, MBG, CKK)
CLIFFORD ALEXANDER, *et al.*, Plaintiffs, v. WILLIAM M. DALEY, *et al.*, Defendants.	)	Civ. No. 98–2187 (LFO, MBG, CKK)

MEMORANDUM OPINION

FILED
Mar[ch] 20, 2000
Nancy Mayer-Whittington, Clerk
U.S. District Court

Before: GARLAND, *Circuit Judge*, and OBERDORFER and KOLLAR-KOTELLY, *District Judges*.

Per Curiam opinion for the Court filed by *Judges* GARLAND and KOLLAR-KOTELLY, in which *Judge* OBERDORFER joins as to Parts I, II, and III.

OBERDORFER, *District Judge*, filed an opinion dissenting in part.

PER CURIAM: In these consolidated lawsuits, seventy-five residents of the District of Columbia, along with the District of Columbia itself, challenge as unconstitutional the denial of their right to elect representatives to the Congress of the United States. Plaintiffs argue that their exclusion from representation is unjust. They note that the citizens of the District pay federal taxes and defend the United States in

times of war, yet are denied any vote in the Congress that levies those taxes and declares those wars. This, they continue, contravenes a central tenet of our nation's ideals: that governments "deriv[e] their just powers from the consent of the governed." THE DECLARATION OF INDEPENDENCE para. 2.

None of the parties contests the justice of plaintiffs' cause. President Clinton and the other defendants, however, maintain that the dictates of the Constitution and the decisions of the Supreme Court bar us from providing the relief plaintiffs seek. Any such relief, they say, must come through the political process.

Plaintiffs' grievances are serious, and we have given them the most serious consideration. In the end, however, we are constrained to agree with defendants that the remedies plaintiffs request are beyond this court's authority to grant.

I

On June 30, 1998, D.C. resident Lois Adams and nineteen co-plaintiffs filed suit in *Adams v. Clinton*. Their complaint alleges that the failure to apportion congressional representatives to the District, and to permit District residents to vote in House and Senate elections, violates their constitutional rights to equal protection of the laws and to a republican form of government. They further contend that those same rights are violated by Congress's exercise of exclusive jurisdiction over the District, and by its denial to plaintiffs of "a state government, insulated from Congressional interference in matters of local concern." *Adams* Compl. ¶ 109. In connection with the latter claim, they seek an injunction directing the District of Columbia Financial Responsibility and Management Assistance Authority, commonly known as the "Control Board,"[1] to "take no further action" and to "disband itself." *Id.* at 28. The *Adams* complaint names as defendants President William Jefferson Clinton, the Clerk and the Sergeant at Arms of the House of

[1] The Control Board was established pursuant to the District of Columbia Financial Responsibility and Management Assistance Act, Pub. L. No. 104-8, 109 Stat. 97 (1995).

Representatives, and the Control Board.

On September 14, 1998, District of Columbia resident Clifford Alexander, fifty-six other residents of the District, and the District itself filed suit in *Alexander v. Daley*. Like their counterparts in *Adams*, the *Alexander* plaintiffs allege that their inability to vote for representatives and senators violates their rights to equal protection and to a republican form of government. The *Alexander* plaintiffs also allege that the denial of congressional representation violates their right to due process and abridges their privileges and immunities as citizens of the United States. Finally, they contend that the denial of their right to vote violates Article I and the Seventeenth Amendment of the Constitution, which provide that the members of the House shall be chosen by "the People of the several States" and that senators shall come "from each State, elected by the people thereof." U.S. CONST. art. I, § 2, cl. 1; *id.* amend. XVII, cl. 1. The *Alexander* complaint names as defendants Secretary of Commerce William M. Daley; the Clerk, the Sergeant at Arms, and the Chief Administrative Officer of the House of Representatives; the Secretary and the Doorkeeper/Sergeant at Arms of the Senate; and the United States.

On November 3, 1998, a single-judge district court consolidated the two lawsuits. *See Adams v. Clinton*, Civ. No. 98–1665 (D.D.C. Nov. 3, 1998) (Oberdorfer, J.). On November 6, that court granted motions by both sets of plaintiffs to appoint a three-judge district court pursuant to 28 U.S.C. § 2284(a), which provides that "[a] district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts." *See Adams v. Clinton*, 26 F. Supp.2d 156, 160 (D.D.C. 1998) (Oberdorfer, J.). This court subsequently convened, disposed of certain preliminary motions, *see Adams v. Clinton*, 40 F. Supp.2d 1, 5 (D.D.C. 1999), and heard oral argument.

Currently pending are motions to dismiss or for summary judgment on behalf of each of the parties. All parties agree that the consolidated lawsuits contain no genuine issue as to

any material fact and that decision on the pending motions is appropriate. We first address whether all of the claims disputed in these motions are properly before this three-judge panel. We then address the standing of plaintiffs to pursue those claims that are properly before us. Finally, we examine the merits of those claims.

II

The parties have not asked us to revisit the original judge's determination that this case falls within the confines of the three-judge court statute, and we will not do so insofar as the complaints allege the failure to apportion members of the House of Representatives to the District. We have, however, determined that this court should relinquish jurisdiction over the other claims raised in the complaints and pending motions. These include both complaints' demands for representation in the Senate, which, because they do not "challeng[e] the constitutionality of the apportionment of congressional districts," plainly fall outside the jurisdictional mandate of section 2284(a). They also include the *Adams* plaintiffs' challenges to Congress' continuing exercise of exclusive authority over matters of local concern, particularly their challenge to the existence of the Control Board. Although these claims involve some issues akin to those found in the representation claims, they do not directly challenge congressional apportionment and therefore also fall outside the language of section 2284(a). *Cf. Public Serv. Comm'n v. Brashear Freight Lines, Inc.*, 312 U.S. 621, 625 (1941) (holding that three-judge court should not consider "questions not within the statutory purpose for which the two additional judges ha[ve] been called").

Not only do the aforementioned claims fall outside the scope of section 2284(a), but they are also not the type of claims over which three-judge courts commonly assert supplemental jurisdiction. *See generally Allee v. Medrano*, 416 U.S. 802, 812 (1974) (indicating that three-judge courts may assert ancillary jurisdiction over certain non-three-judge claims); *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 504

n.5 (1972) (same). For example, it is not necessary to resolve the Senate and Control Board claims in order to provide a "final and authoritative decision of the controversy" among the parties involved in the apportionment claims. *Public Serv. Comm'n*, 312 U.S. at 625 n.5; *see also Allee*, 416 U.S. at 812 n.8. Nor is this a case in which resolution of the non-three-judge claims would allow us to dispose of the claims that provide the basis for our jurisdiction. *See Allee*, 416 U.S. at 812 n.8; *United States v. Georgia Pub. Serv. Comm'n*, 371 U.S. 285, 287-88 (1963) ("Once [a three-judge court has been] convened the case can be disposed of below or here on any ground, whether or not it would have justified the calling of a three-judge court."); *see also Rosado v. Wyman*, 397 U.S. 397, 402 (1970) (stating that three-judge court must decide non-constitutional claims "in preference to deciding the original constitutional claim" for which court convened).

Because the claims that do not directly challenge the apportionment of representatives do not implicate the concerns that have traditionally caused three-judge courts to exercise supplemental jurisdiction, it may be improper for us to exercise such jurisdiction over them. *Cf. Perez v. Ledesma*, 401 U.S. 82, 86-87 (1971) (holding that three-judge court convened to hear challenges to certain state laws did not have jurisdiction over related attack on similar local ordinance). Even if our jurisdiction over those claims were proper, however, we would retain the discretion not to exercise it. *See Turner Broad. Sys., Inc. v. FCC*, 810 F. Supp. 1308, 1314 (D.D.C. 1992) (three-judge court). As we noted at an earlier stage in these proceedings, the Supreme Court has indicated that "even when [a] three-judge court has jurisdiction over [an] ancillary claim, 'the most appropriate course' may be to remand it to [a] single district judge." *Adams*, 40 F. Supp.2d at 5 (quoting *Hagans v. Lavine*, 415 U.S. 528, 544 (1974)); *see also Diven v. Amalgamated Transit Union Int'l & Local 689*, 38 F.3d 598, 601 (D.C. Cir. 1994).

Remand of the non-apportionment claims is the appropriate course here. There is no doubt that resolution of the Senate and Control Board claims would take us far afield

from the core of the original jurisdictional grant, and at the same time deprive the Court of Appeals of the opportunity to review our work. *See* 28 U.S.C. § 1253 (providing that final judgment of three-judge district court is appealable directly to Supreme Court). To avoid reaching "constitutional questions we need not reach, asserting authority we may not have," *Adams*, 40 F. Supp.2d at 5, we will address here only those claims that challenge the constitutionality of an apportionment of congressional districts that fails to account for the District of Columbia and its residents. The balance of the claims are remanded for determination by the single district judge before whom they were originally filed.

III

Before reaching the merits of the claims for representation in the House, we must determine two further questions regarding our jurisdiction: whether plaintiffs' challenge represents a nonjusticiable political question, and whether plaintiffs have the requisite standing to bring it. *See Steel Co. v. Citizens for a Better Env't*, 118 S. Ct. 1003, 1012 (1998) (holding that Article III courts must consider jurisdictional questions before deciding merits of causes of action).

A

The defendant House officials contend that this case presents a nonjusticiable political question because there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker v. Carr*, 369 U.S. 186, 217 (1962). Specifically, they assert that because Article I of the Constitution limits voting to residents of the fifty states, only congressional legislation or constitutional amendment can remedy plaintiffs' exclusion from the franchise.

We do not agree that the political question doctrine bars our consideration of this case. The Supreme Court has repeatedly declared that "[c]onstitutional challenges to apportionment are justiciable." *Franklin v. Massachusetts*,

505 U.S. 788, 801 & n.2 (1992) (plurality opinion of O'Connor, J.) (citing *Department of Commerce v. Montana*, 503 U.S. 442 (1992)); *accord Wesberry v. Sanders*, 376 U.S. 1, 6 (1964). The resolution of this dispute is "textually committed" only if we assume before we begin that plaintiffs cannot prove what they allege: that District residents are among those qualified to vote for congressional representatives under Article I. That purely legal issue is one the courts are perfectly capable of resolving, and is similar to those the Supreme Court has repeatedly found appropriate for judicial resolution. *See, e.g.*, *Montana*, 503 U.S. at 458-59 ("[T]he interpretation of the apportionment provisions of the Constitution is well within the competence of the Judiciary. The political question doctrine presents no bar to our reaching the merits of this dispute . . . .") (citations omitted); *Baker*, 369 U.S. at 226.

B

Next, we consider plaintiffs' standing to bring these consolidated actions. The Supreme Court has summarized the requirements for standing as follows:

> [T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact" -- an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of . . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (footnote, citations, and internal quotations omitted). For the purposes of standing analysis, we "assume the validity of a plaintiff's substantive claim." *Catholic Soc. Serv. v. Shalala*, 12 F.3d 1123, 1126 (D.C. Cir. 1994); *accord Warth v. Seldin*, 422 U.S. 490, 500 (1975) ("[S]tanding in no way depends on the merits of the plaintiff's contention that particular conduct is illegal . . . ."); *Claybrook v. Slater*, 111 F.3d 904, 907 (D.C. Cir.

1997); *United States House of Representatives v. United States Dep't of Commerce*, 11 F. Supp.2d 76, 83 (D.D.C. 1998) (three-judge court), *appeal dismissed*, 119 S. Ct. 765 (1999).

Defendants do not seriously dispute that plaintiffs' lack of representation in the House satisfies the "injury in fact" requirement. *See* Tr. of Mot. Hr'g at 70. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry*, 376 U.S. at 17 (invalidating malapportioned congressional districts). Hence, if the residents of the District are entitled to such a voice – which we must presume for purposes of standing analysis – its denial plainly constitutes an "injury in fact." *See Department of Commerce v. United States House of Representatives*, 119 S. Ct. 765, 774 (1999) (holding that resident's "expected loss of a Representative to the United States Congress" through reapportionment "undoubtedly satisfies the injury-in-fact requirement of Article III standing"); *Michel v. Anderson*, 14 F.3d 623, 626 (D.C. Cir. 1994) (noting that "[i]t is obvious that Georgia voters would have suffered an injury" if "the House were to prevent all congressmen from the State of Georgia from voting in the House").

Defendants focus instead on the second and third prerequisites of standing: the requirements of causation and redressability. That analysis in turn, focuses on the statutory process for apportionment of congressional districts. The Secretary of Commerce is required, within nine months of completing the decennial census, to report to the President the total population of each state for purposes of congressional apportionment. *See* 13 U.S.C. § 141(b).[2] Upon receiving the report, the President must transmit to Congress "a statement showing the whole number of persons in each State . . . and the number of Representatives to which each

[2] The statute provides:

> The tabulation of total population by States . . . as required for the apportionment of Representatives in Congress among the several States shall be . . . reported by the [Commerce] Secretary to the President of the United States.

13 U.S.C. § 141(b).

State would be entitled under an apportionment of the then existing number of Representatives." 2 U.S.C. § 2a(a). "Each State shall be entitled . . . to the number of Representatives shown" in the President's statement, and within fifteen days of receiving that statement, the Clerk of the House must "send to the executive of each State a certificate of the number of Representatives to which such State is entitled . . . ." *Id.* § 2a(b); *see Franklin*, 505 U.S. at 792. The Secretary concedes that he has not included, and does not plan to include, a separate entry for the District of Columbia in his report to the President. Nor has he included, nor does he plan to include, the District's population within that of any state.

With respect to causation, the Secretary of Commerce and the Clerk of the House contend that they bear no individual responsibility for the exclusion of the District from the apportionment process because they are merely carrying out the constitutional requirement (repeated *in haec verba* in the statute) that representatives be apportioned "among the several States,"[3] and because the District of Columbia is not a state. This argument once again assumes that plaintiffs will not prevail on the merits. We, however, must assume here that plaintiffs will prevail, and hence that the District *is* a "state" for apportionment purposes and that the Constitution is not the cause of their electoral disability.

The more difficult standing question is that of redressability. Secretary Daley contends that even if we may order him to include the District's citizens within his report,[4] the President is not bound to accept that report. He further argues that we are without power to enjoin the President if he refuses to adhere to a declaration in plaintiffs' favor. Making an analogous argument, the Clerk of the House contends that

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[3] U.S. CONST. art. I, § 2, cl. 3; 13 U.S.C. § 141(b); *see supra* note 2.

[4] *See Franklin*, 505 U.S. at 802 (plurality opinion of O'Connor, J.) (noting that "injunctive relief against executive officials like the Secretary of Commerce is within the courts' power").

the Speech or Debate Clause[5] likewise prevents us from enjoining her should she decide not to comply with our declaration of the law. Defendants argue that, because the chain of causation may be broken in these two places, plaintiffs cannot satisfy the requirement of redressability.[6]

We are guided in our resolution of this issue by the Supreme Court's resolution of a similar dispute in *Franklin v. Massachusetts*, which arose out of a three-judge court proceeding pursuant to the same jurisdictional statute at issue here. *See* 505 U.S. at 788. In that case, Massachusetts and two of its residents challenged the method used by the then-Secretary of Commerce for allocating overseas military personnel among the states for apportionment purposes -- a method that resulted in Massachusetts losing a seat in the House. *See id.* at 790. The plaintiffs sued the President, the Secretary of Commerce, the Clerk of the House, and Census Bureau officials for violating the Administrative Procedure Act (APA) and the Constitution. As in this case, the defendants contended that the court could not grant injunctive relief against the President, and that absent such relief, a judgment against the remaining defendants would fail to redress the plaintiffs' injury. *See id.* at 802-03.

Although divisions among the Justices make the Court's opinion difficult to parse, it nonetheless appears that eight Justices rejected the contention that the *Franklin* plaintiffs lacked standing. Four Justices agreed with the defendants that, at a minimum, the prospect of an injunction against the President was "extraordinary, and should have raised judicial eyebrows." *Id.* at 802 (plurality opinion of O'Connor, J.).

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[5] U.S. CONST. art. I, § 6, cl. 1 ("[F]or any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place.").

[6] Defendants do not shrink from the implications of their position. As noted at oral argument, their contention would apply with equal force to a President's decision to deny representation to a state that voted against him in the last election (at least if that decision were supported by a majority in Congress). *See* Tr. of Mot. Hr'g at 54. Indeed, the Executive Branch defendants concede that, on their theory, no one would have standing to challenge a presidential decision to *grant* the District the vote simply by apportioning it representatives in his transmission to the Clerk. *See id.* at 54-55.

Those four concluded, however, that they could avoid deciding the propriety of granting relief against the President (or the House officials) because the plaintiffs' injury was likely to be redressed by declaratory relief against the Secretary of Commerce alone. *See id.* at 803. A judgment against the Secretary would be enough to cause her to send the correct numbers, the four Justices thought, and it was fair to assume that the President and the congressional officials would then follow the law as the Court articulated it:

> [A]s the Solicitor General has not contended to the contrary, we may assume it is substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation of the census statute and constitutional provision by the District Court, even though they would not be directly bound by such a determination.

Id. Accordingly, the four went on to consider the merits of plaintiffs' constitutional argument, ultimately holding against them. *See id.* at 806.

Four more Justices concurred in the judgment against plaintiffs without addressing standing. They did, however, conclude that the President's role in the apportionment process was strictly ministerial, and thus that the Secretary's report could be challenged as "final agency action" under the APA. *See id.* at 807, 808-17 (Stevens, J., concurring in part). "[T]he statute," these four said, "does not contemplate the President's changing the Secretary's report." *Id.* at 814. Because these four Justices went on to consider (and deny) the merits of the plaintiffs' claims, the sole Justice dissenting on the issue of standing concluded that they had necessarily found it to exist. *See id.* at 823-24 & n.1 (Scalia, J., concurring in part). Even if that was not necessarily so,[7] the view of these four regarding the President's lack of discretion supports plaintiffs' claim of redressability. Since, in the view of these four Justices, the President is without discretion to

[7] *Franklin* preceded *Steel Co.*, in which the Court expressly held that Article III courts must consider jurisdictional questions before deciding whether a plaintiff has stated a cause of action. *See Steel Co.*, 118 U.S. at 1012.

modify the Commerce Secretary's report,[8] the ability of the court to enjoin the Secretary establishes the necessary redressability.

Deriving a governing principle from the opinions of a fragmented Court is always problematic.[9] Nonetheless, we are bound to try to discern such a principle. *Cf. Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .") (internal quotation omitted). In *Franklin*, eight Justices reached one common conclusion: that a judgment directing the Secretary of Commerce to report the population of the states in a specified way would directly affect the apportionment of the House, either because the President would voluntarily abide by it or because the President had no choice but to abide by it.

Although *Franklin* is not identical to the case before us, it is sufficiently analogous to govern our determination of plaintiffs' standing. This case involves the same apportionment statute as that at issue in *Franklin*. The Secretary of Commerce plays the same role here as the Secretary did there, and is equally amenable to suit. Here, as in *Franklin*, neither the President nor the House officials have suggested that they would refuse to follow a decision of this

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[8] *See Franklin*, 505 U.S. at 813 (Stevens, J., concurring in part) ("[T]he President has consistently and faithfully performed the ministerial duty [of relaying the Secretary's figures to the Clerk without modification]. The Court's suggestion today that the statute gives him discretion to do otherwise is plainly incorrect.").

[9] In this case, for example, although the four Justices just cited found the President to have nothing more than a ministerial responsibility with respect to the Secretary's report, a majority of the Court (including the four Justices who found standing) held that the Secretary's decision did not constitute final agency action under the APA because "[the President] is not expressly required to adhere to the policy decisions reflected in the Secretary's report. . . . [I]t is the President's personal transmittal of the report to Congress that settles the apportionment . . . ." *Franklin*, 505 U.S. at 799. The same majority noted that Congress had intended to make the reapportionment process "virtually self-executing, so that the number of Representatives per State would be determined by the Secretary of Commerce and the President without any action by Congress." *Id.* at 792.

court (assuming, of course, that it were upheld on appeal) regarding the apportionment of congressional districts.[10] Hence, we can conclude that plaintiffs satisfy the redressability prong of the standing inquiry and, as in *Franklin*, can do so without deciding whether the President or the Clerk is subject to suit.[11]

The distinction the Executive Branch defendants draw between the two cases is not significant. They contend that unlike *Franklin*, which involved the Secretary's policy decision regarding how the census should count military personnel living abroad, here the Secretary is merely carrying out what he perceives the Constitution to require. As defendants point out, the plurality opinion in *Franklin* observed that "[t]he Secretary certainly has an interest in defending her policy determinations concerning the census" and therefore "has an interest in litigating" the accuracy of reapportionment. *Franklin*, 505 U.S. at 803 (plurality opinion of O'Connor, J.). Because in this case Secretary Daley is not defending one of his own policy decisions, defendants contend that we cannot find he has sufficient stake in the outcome of these suits.

Defendants' argument amounts to a claim that the parties lack the "concrete adverseness" necessary to assure that there is an actual "case" or "controversy" within the meaning of Article III of the Constitution. *See Gollust v. Mendell*, 501 U.S. 115, 125-26 (1991) (quoting *Baker*, 369 U.S. at 204); *Diamond v. Charles*, 476 U.S. 54, 61-62 (1986). That claim is

[10] *See* House Opp'n to Pls.' Mot. for Summ. J. at 5-6 ("Were District residents determined to have the right to elect congressional representatives, there is no doubt that the District would be included in the apportionment process.").

[11] An alternative ground for finding redressability, again without resolving the question of the President's amenability to suit, is contained in the D.C. Circuit's opinion in *Swan v. Clinton*, 100 F.3d 973 (D.C. Cir. 1996). There, the court held that even if "the President has the power, if he so chose, to undercut . . . relief" in the form of an injunction against a subordinate official, the "partial relief [plaintiff] can obtain against subordinate executive officials is sufficient for redressability." *Id.* at 980-81. This, the court said, "simply recogniz[es] that such partial relief is sufficient for standing purposes when determining whether we can order more complete relief would require us to delve into complicated and exceptionally difficult questions regarding the constitutional relationship between the judiciary and the executive branch." *Id.* at 981.

not persuasive. Nothing in *Franklin* suggested that its standing analysis turned on the fact that the Secretary's decision was based on her view of policy rather than law. Although Secretary Daley's decision to exclude District residents is based on his interpretation of what the Constitution (and the statute that follows it verbatim) requires, his interest in and responsibility for defending that interpretation is at least as substantial as his interest in defending his policy judgments. *See* U.S. CONST. art. VI, cl. 3 ("[A]ll executive and judicial Officers, both of the United States and the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . ."). And as we have already concluded that plaintiffs have suffered constitutional "injury in fact" from the denial of their right to vote, the fact that the injury arises out of a dispute of law rather than policy does not deprive them of standing to sue.

Before concluding our standing analysis, we must also consider the fact that the *Adams* plaintiffs, unlike their *Alexander* counterparts, did not name the Secretary of Commerce as a defendant. We do not regard this as fatal to applying *Franklin* to the *Adams* complaint. In *Swan v. Clinton*, this Circuit held that, when necessary to satisfy the redressability component of standing, a court may constructively amend a complaint to include prayers for relief against unnamed defendants in their official capacities who might otherwise be in a position to frustrate the implementation of a court order. *See* 100 F.3d 973, 979-80 & n.3 (D.C. Cir. 1996) (citing, *inter alia*, *United States v. New York Tel. Co.*, 434 U.S. 159, 174 (1977)). Here it is not even necessary to constructively amend the complaint to bring the additional defendant before the court, because the *Alexander* plaintiffs did sue the Secretary, and we have consolidated the two cases. The Secretary is therefore already before us, and his counsel has already raised all of the appropriate arguments on his behalf.

Finally, we must address the question of whether the failure of both complaints to include Maryland election officials as defendants poses an insuperable obstacle to

redressability, given that one proposed remedy is to permit plaintiffs to vote for representatives as if they were citizens of Maryland. Although there is no guarantee that Maryland officials would permit District residents to vote there even if we directed the Secretary to count them as Maryland citizens for purposes of apportionment, the fact that officials who are not parties to these cases are in a position to thwart one of many potential remedies does not defeat our jurisdiction. *See id.* at 980-81. Moreover, plaintiffs point out that if we were to find them to be Maryland citizens for purposes of congressional voting, a remedy could be crafted that would not necessarily rely on Maryland's electoral machinery. *See Alexander* Pls.' Consolidated Mem. in Opp'n to Defs.' Mots. to Dismiss at 35 n.18 [hereinafter *Alexander* Pls.' Opp'n] (suggesting that votes of District residents be counted separately and added to Maryland totals); Tr. of Mot. Hr'g at 114-15.

In sum, we conclude that the plaintiffs in these consolidated cases have standing to raise claims challenging the constitutionality of the exclusion of the District of Columbia from the apportionment of congressional districts.[12]

IV

We now turn to the merits of plaintiffs' claims. In this Part, we consider the *Alexander* plaintiffs' contention that their right to vote in congressional elections is guaranteed by Article I of the Constitution, as well as defendants' opposing argument that the same Article precludes such a right. In Part V, we consider additional arguments, raised by both groups of plaintiffs, premised on other provisions of the Constitution.

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[12] Because the individual plaintiffs in *Alexander* and *Adams*, all adult residents of voting age, have standing to sue, we need not consider whether plaintiff District of Columbia has standing as well. *See United States House of Representatives*, 119 S. Ct. at 773; *Animal Legal Defense Fund, Inc. v. Glickman*, 154 F.3d 426, 429 (D.C. Cir. 1998) (en banc) (citing *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996) ("For each claim, if constitutional and prudential standing can be shown for at least one plaintiff, we need not consider the standing of the other plaintiffs to raise that claim.")).

> Article I, section 2, clause 1 of the Constitution provides: The House of Representatives shall be composed of Members chosen every second Year *by the People of the several States*, and the Electors in each *State* shall have the Qualifications requisite for Electors of the most numerous Branch of the *State* Legislature.

U.S. CONST. art. I, § 2, cl. 1 (emphasis added). Although standing alone the phrase "people of the several States" could be read as meaning all the people of the "United States" and not simply those who are citizens of individual states, the Article's subsequent and repeated references to "state[s]" -- beginning with the balance of the same clause quoted above -- make clear that the former was not intended. *See, e.g.*, *id.* (electors "in each State" shall have qualifications of electors of most numerous branch "of the State Legislature"); *id.* art. I, § 2, cl. 2 (each representative shall "be an Inhabitant of that State" in which he or she is chosen); *id.* art. I, § 2, cl. 3 (representatives shall be "apportioned among the several States which may be included within this Union"); *id.* ("each State shall have at Least one Representative"); *id.* art. I, § 2, cl. 4 (the Executive Authority of the "State" shall fill vacancies); *id.* art. I, § 4, cl. 1 (the legislature of "each State" shall prescribe times, places, and manner of holding elections for representatives). Indeed, for this reason -- and as the *Alexander* plaintiffs concede -- residents of United States territories are not entitled to vote in federal elections, notwithstanding that they are United States citizens.[13]

Plaintiffs accordingly do not dispute that to succeed they must be able to characterize themselves as citizens of a "state." *See Alexander* Pls.' Opp'n at 15; *accord Adams* Pls.' Opp'n to the Federal Defs.' Mots. to Dismiss at 51 [hereinafter *Adams* Pls.' Opp'n]. Instead, they contend that District

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[13] *See Igartua de la Rosa v. United States*, 32 F.3d 8 (1st Cir. 1994) (holding that United States citizens in Puerto Rico are not entitled to vote in presidential elections); *Attorney Gen. of Guam v. United States*, 738 F.2d 1017 (9th Cir. 1984) (holding that United States citizens in Guam are not entitled to vote in presidential and vice-presidential elections); Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its U.S.-Flag Islands*, U. HAW. L. REV. 445, 512 (1992); *Alexander* Pls.' Opp'n at 5-6.

residents can fairly be characterized as citizens of a "state," as the term was intended in Article I, under either of two theories. First, they argue that the District of Columbia itself may be treated as a state through which its citizens may vote. Second, they contend that District citizens may vote in congressional elections through the State of Maryland, based on their "residual" citizenship in that state – the state from whose territory the current District was originally carved. In the following sections we consider the validity of each theory.

A

The *Alexander* plaintiffs' first theory is that "the District itself may be treated as the 'state' through which its citizens may vote" under Article I. Mem. in Supp. of Mot. of Pls. Alexander et al. for Summ. J. at 48 [hereinafter *Alexander* Pls.' Summ. J. Mem.]. As plaintiffs correctly note, the Supreme Court has on occasion interpreted the constitutional term "state" to include the District. *See Loughran v. Loughran*, 292 U.S. 216, 228 (1934) (holding that Full Faith and Credit clause binds "courts of the District . . . equally with courts of the States"); *cf. Callan v. Wilson*, 127 U.S. 540, 550 (1888) (holding that right to trial by jury extends to residents of District).[14] As they concede, however, the Court also has interpreted the term "state" to exclude the District. *See, e.g., Hepburn & Dundas v. Ellzey*, 6 U.S. (2 Cranch) 445, 452 (1805) (holding that diversity jurisdiction provision of Article III, section 2 does not cover cases in which one party is resident of District, because "the members of the American confederacy only are the states contemplated in the constitution").

The measure of "[w]hether the District of Columbia constitutes a 'State or Territory' within the meaning of any particular . . . constitutional provision depends upon the

[14] Plaintiffs also note that Congress has passed numerous statutes that treat the District as though it were a state for various purposes. *See Alexander* Pls.' Summ. J. Mem. at 48 n.47 (citing, *inter alia*, 18 U.S.C. § 1961 (RICO Act); 50 U.S.C. § 466 (Military Selective Service Act)). But these expressions of congressional intent, most of which were passed more than a century after the ratification of the Constitution, provide little insight into the intent of the Framers.

character and aim of the specific provision involved."[15] *District of Columbia v. Carter*, 409 U.S. 418, 420 (1973).[16] The cases plaintiffs cite do not involve Article I, nor do they involve constitutional rights that textually appear to require citizenship (or residence) in a state.[17] Defendants argue that, by contrast, when dictating the composition of Congress, the Constitution leaves no doubt that only the residents of actual states are entitled to representation. An examination of the Constitution's language and history, and of the relevant judicial precedents, persuades us that defendants are correct and that the District-as-state theory is untenable.

1. We begin with the language of Article I, which makes clear just how deeply Congressional representation is tied to the structure of statehood. Indeed, as we explore each relevant constitutional provision, it becomes apparent how far afield from the common understandings of the relevant terms we would have to go to sustain plaintiffs' theory.

As previously noted, besides stating that the House shall be composed of members chosen by the people of the several states, clause 1 of Article I, section 2 requires that voters ("Electors") in House elections "have the Qualifications requisite for the Electors of the most numerous branch of *the State Legislature*." U.S. CONST. art. I, § 2, cl. 1

[15] We therefore reject the dissent's suggestion that if the District were not considered a state for purposes of Article I, District residents would also be deprived of the right to travel under Article IV.

[16] In *Carter*, the Court held that the District of Columbia is not a "State or Territory" within the meaning of 42 U.S.C. § 1983, but rather "is truly *sui generis* in our governmental structure." *Carter*, 409 U.S. at 432; *accord Palmore v. United States*, 411 U.S. 389, 395 (1973) ("The District of Columbia is constitutionally distinct from the States . . . .") (citing *Hepburn & Dundas*, 6 U.S. (2 Cranch) at 445).

[17] *See, e.g.*, *Callan*, 127 U.S. at 550 (relying on language of Article III providing that jury trial, for "crimes . . . *not committed within any State*, . . . shall be at such place or places as the legislature may direct"; and noting that Article III was specifically amended "'to provide for trial by jury of offenses committed *out of any state*'") (quoting James Madison) (emphasis added). Although in *Loughran* Justice Brandeis found the Full Faith and Credit Clause, U.S. CONST. art. IV, § 2, to bind "*courts* of the District . . . equally with courts of the States," 292 U.S. at 228 (emphasis added), in *Heald v. District of Columbia*, he made clear that "[*r*]*esidents* of the District lack the suffrage and have politically no voice," 259 U.S. 114, 124 (1922) (emphasis added).

(emphasis added).[18] If the District were regarded as a state for purposes of this provision, what could the reference to "State Legislature[s]" mean? The thirteen original states all had such legislatures, as do each of the present fifty. But for most of its history, the District of Columbia has had nothing that could even roughly be characterized as a legislature for the entire District.[19] Although plaintiffs point to the existence of the current elected city council, *see Alexander* Pls.' Opp'n at 24, Congress did not pass the "home rule" statute creating that entity until 1973, and the Court of Appeals for this Circuit has indicated that such a body is not constitutionally required.[20] A right to vote that depends upon the existence of such an occasional institution can hardly have been what the

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[18] *See also* U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof . . . .").

[19] For the first 70 years, there were separate local governmental structures for Washington, Georgetown, and – until the retrocession of the Virginia portion of the District in 1846 – Alexandria. *See, e.g.*, An Act to Incorporate the Inhabitants of the City of Washington, in the District of Columbia, 2 Stat. 195, ch. 53, § 2 (1802). *See generally* WILLIAM TINDALL, ORIGIN AND GOVERNMENT OF THE DISTRICT OF COLUMBIA 14-29 (1909). In 1871, Congress established a territorial form of government for the District, *see* An Act To Provide a Government for the District of Columbia, 16 Stat. 419, ch. 62 (1871), which was replaced by a commission system in 1874, *see* An Act for the Government of the District of Columbia, and for Other Purposes, 18 Stat. 116, ch. 337 (1874). As modified in 1878, the District's governing body was a three-person commission appointed by the President. *See id.*; An Act Providing a Permanent Form of Government for the District of Columbia, 20 Stat. 102, ch. 180 (1878). The commission system was replaced in 1967 by a mayor-commissioner and council form of government, the members of which were appointed by the President. *See* Reorganization Plan No. 3 of 1967, Pub. L. No. 90-623, 81 Stat. 948 (1967). It was not until 1973 that the present "home rule" form of government was established, creating a mayor and council elected by the citizens of the District and granting them certain executive and legislative authority; the home rule statute reserved ultimate authority over District governance to Congress. *See* District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973).

[20] *See Breakefield v. District of Columbia*, 442 F.2d 1227, 1229 (D.C. Cir. 1970) (noting that Circuit has rejected "the claim that . . . the members of the [then non-elected] City Council were illegally appointed 'because the citizens of the District have not been given the opportunity by popular vote to elect persons to the positions held by' them") (quoting *Carliner v. Commissioner*, 412 F.2d 1090, 1091 (D.C. Cir. 1969)); *see also D.C. Fed'n v. Volpe*, 434 F.2d 436, 443 n.28 (D.C. Cir. 1970); *Hobson v. Tobriner*, 255 F. Supp. 295 (D.D.C. 1966).

Framers contemplated.

Moreover, and more important, it is clear that the ultimate legislature the Constitution envisions for the District is not a city council, but rather Congress itself. The District Clause expressly grants Congress the power to "exercise exclusive Legislation in all Cases whatsoever" over the district that would become the seat of government. U.S. CONST. art. I, § 8, cl. 17. Plaintiffs themselves argue that in the "absence" of a city council, Congress should be considered the state legislature for purposes of Article I. *See Alexander* Pls.' Opp'n at 24. But Congress cannot be characterized as a "state legislature" without doing violence to the meaning of that term. Indeed, to characterize it as such would turn the Qualifications Clause into a circle without beginning or end. Under section 2, clause 1, House voters must have the qualifications requisite for voters of the most numerous branch of the state legislature. If that legislature were Congress itself, with the House as its most numerous branch, then the clause would say no more than that voters for the House must have the qualifications requisite for voters for the House – a tautology without constitutional content.

Including the District within the definition of "state" is also inconsistent with the provisions of clause 3 of Article I, section 2, the clause that directly addresses the issue of congressional apportionment. That clause provides that "Representatives . . . shall be apportioned among *the several States which may be included within this Union*, according to their respective numbers." U.S. CONST. art. I, § 2, cl. 3 (emphasis added).[21]

That provision plainly contemplates true states and not the District, which neither was one of the original states nor has been "admitted by the Congress into this Union." *Id.* art. IV, § 3, cl. 1. Indeed, the "Seat of Government" contemplated by

[21] Section 2 of the Fourteenth Amendment modified this provision by establishing that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons *in each State* . . . ." U.S. CONST. amend. XIV, § 2 (emphasis added); *see Montana*, 503 U.S. at 445 n.1; *see also Carter*, 409 U.S. at 424 ("[T]he District of Columbia is not a 'State' within the meaning of the Fourteenth Amendment . . . .").

the Constitution is subsequently described in Article I as a "District," in contrast to the "particular States" whose cessions of territory were expected to create it.[22] And, as if to remove any doubt, clause 3 goes on to identify specifically those thirteen entities it regards as the immediate post-ratification states, and to assign each an initial apportionment of representatives until an "actual Enumeration" of "each State['s]" "respective Numbers" can be accomplished. *Id.* art. I, § 2, cl. 3.[23] The District is not included within that initial apportionment.[24]

The effort to define the District as a state generates still further incongruities with respect to the next clause of Article I, section 2. Clause 4 provides: "When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies."

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[22] *See* U.S. CONST. art. I, § 8, cl. 17 (granting Congress power to exercise exclusive legislation in all cases whatsoever "over such District . . . as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of Government of the United States").

[23] The clause reads:

> The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

U.S. CONST. art. I, § 2, cl. 3.

[24] Plaintiffs suggest that the District may not have been included because the site of the seat of government had not yet been chosen when the Constitution was drafted, and because no one knew what its population would be. While it is true that the District did not exist at the time the Constitution was drafted, provision had been made for its creation, *see* U.S. CONST. art. I, § 8, cl. 17, and it was possible that it would be established prior to the first enumeration (i.e., the first census). It is also true that the original population of the District was small. *Compare* TINDALL, *supra* note 19, at 15 (estimating 1800 population at 14,093), *with* 2 BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES 26 (bicentennial ed. 1975) (listing 1800 census count at 8,000). The Framers, however, assumed that the population would grow substantially. L'Enfant's original plan provided for a city of 800,000, which at the time was the size of Paris. *See Home Rule: Hearings Before Subcomm. No. 6 of the Comm. on the District of Columbia*, 88th Cong. 347 (1964) (statement of Robert F. Kennedy, Attorney General).

Id. art. I, § 2, cl. 4. But who or what is "the Executive Authority" of the District? Plaintiffs offer the current home-rule mayor as that authority, *see Alexander* Pls.' Opp'n at 24, but we again are confronted by the relative recency of that position. *See supra note* 19. And we also again have the problem that it is Congress that is the ultimate executive authority for the District. *See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 76 (1982) ("Congress' power over the District of Columbia encompasses the full authority of government, and thus, necessarily, the Executive and Judicial powers as well as the Legislative."). The possibility that the Framers intended Congress to fill its own vacancies seems far too much of a stretch, even if the constitutional fabric were more flexible than it appears to be.

When we turn to the provisions of the Constitution that originally governed voting for the Senate, the complications of defining the District as a state become even more apparent. Although we are remanding the merits of plaintiffs' claims for Senate representation to a single-judge court, the relationship between the House and Senate provisions nonetheless requires us to examine the latter in order to determine the Framers' intentions with respect to the House.

As originally provided under Article I, section 3, the Senate was to be "composed of two Senators from each State," chosen not "by the People of the several States," as in the case of the House, but rather "*by the Legislature thereof.*" U.S. CONST. art. I, § 3, cl. 1 (emphasis added). The impossibility of treating Congress as the legislature under that clause is manifest, as doing so would mean that Congress would itself choose the District's senators. The scenario is further complicated by the fact that clause 2 of the same section provides that Senate vacancies will be filled not just by the state's "Executive," as with the House, but also by the state's "Legislature" when not in recess. *Id.* art. I, § 3, cl. 2. Since, as noted above, Congress is ultimately both the Legislature and Executive for the District, plaintiffs' theory would mean that Congress would fill vacancies in the District's Senate seats -- except when Congress is in recess, in which event Congress

would also fill the vacancies.

It is, of course, not surprising to conclude that the Framers did not contemplate allocating two senators to the District of Columbia. The Senate was expressly viewed as representing the states themselves, *see* THE FEDERALIST NOS. 10, 39, 58, 62 (James Madison) (Jacob E. Cooke ed., 1961), and the guarantee of two senators for each was an important element of the Great Compromise between the smaller and larger states that ensured ratification of the Constitution: the smaller states were guaranteed equal representation notwithstanding their smaller populations. *See Reynolds v. Sims*, 377 U.S. 533, 574 (1964); *Wesberry*, 376 U.S. at 12-13; *see also INS v. Chadha*, 462 U.S. 919, 950 (1983). But reaching this conclusion with respect to the Senate requires reaching a similar conclusion with respect to the House. The House provisions, after all, were "the other side of the compromise": to satisfy the larger states, the House was to be popularly elected, and "in allocating Congressmen the number assigned to *each State* should be determined solely by the number of the State's inhabitants." *Wesberry*, 376 U.S. at 13 (emphasis added). Treating the Senate and House differently with respect to the District would unhitch half that compromise from its historical and constitutional moorings.

In 1913, the Seventeenth Amendment granted the people of "each State," rather than their legislatures, the right to choose senators. U.S. CONST. amend. XVII, cl. 1. After that change, the provisions concerning qualifications and vacancies for the Senate essentially parallel those for the House. *See id.* (providing that "electors . . . shall have the qualifications requisite for electors of the most numerous branch of the State legislatures"); *id.* cl. 2 ("When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments . . . ."). *But see id.* cl. 1 (providing that senators shall be elected by people of "each State," rather than "of the several states" as in provision for representatives in Article I,

section 2, clause 1). Accordingly, no separate discussion of those provisions is necessary.

2. We conclude from our analysis of the text that the Constitution does not contemplate that the District may serve as a state for purposes of the apportionment of congressional representatives. That textual evidence is supported by historical evidence concerning the general understanding at the time of the District's creation.

It is true, as plaintiffs note, that the voting rights of District residents received little express attention at the time of the Constitution's drafting. *See generally* Peter Raven-Hansen, *Congressional Representation for the District of Columbia: A Constitutional Analysis*, 12 HARV. J. ON LEGIS. 167, 172 (1975). As plaintiffs suggest, this lack of attention may have been due to the fact that the District's geographic location had not yet been determined, and that even once selected, the territory had relatively few residents. *See supra* note 24. *But see id.* (noting that L'Enfant anticipated city of Washington growing to size of 800,000). It is also true, as our dissenting colleague argues, that the historical rationale for the District Clause -- ensuring that Congress would not have to depend upon another sovereign for its protection -- would not by itself require the exclusion of District residents from the congressional franchise.[25]

[25] There is general agreement that the District Clause was adopted in response to an incident in Philadelphia in 1783, in which a crowd of disbanded Revolutionary War soldiers, angry at not having been paid, gathered to protest in front of the building in which the Continental Congress was meeting under the Articles of Confederation. *See, e.g.*, KENNETH R. BOWLING, THE CREATION OF WASHINGTON, D.C. 30-34 (1991); THE FEDERALIST NO. 43, *supra*, at 289; JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION §§ 1213 (1833). Despite requests from the Congress, the Pennsylvania state government declined to call out its militia to respond to the threat, and the Congress had to adjourn abruptly to New Jersey. The episode, viewed as an affront to the weak national government, led to the widespread belief that exclusive federal control over the national capital was necessary. "Without it," Madison wrote, "not only the public authority might be insulted and its proceedings be interrupted, with impunity; but a dependence of the members of the general Government, on the State comprehending the seat of the Government for protection in the exercise of their duty, might bring on the national councils an imputation of awe or influence, equally dishonorable to the Government, and dissatisfactory to the other members of the confederacy." THE FEDERALIST NO. 43, *supra*, at 289; *see also* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS

Such evidence as does exist, however, indicates a contemporary understanding that residents of the District would not have a vote in the national Congress. At the New York ratifying convention,[26] for example, Thomas Tredwell argued that "[t]he plan of the *federal city*, sir, departs from every principle of freedom . . . subjecting the inhabitants of that district to the exclusive legislation of Congress, in whose appointment they have no share or vote." 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 402 (Jonathan Elliot ed., 2d ed. 1888), *reprinted in* 3 THE FOUNDERS' CONSTITUTION 225 (Philip B. Kurland & Ralph Lerner eds., 1987).[27] On the same day at that

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ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 220 (Jonathan Elliot ed., 2d ed. 1888), *reprinted in* 3 THE FOUNDERS' CONSTITUTION 225 (Philip B. Kurland & Ralph Lerner eds., 1987) ("Do we not all remember that, in the year 1783, a band of soldiers went and insulted Congress? . . . . It is to be hoped that such a disgraceful scene will never happen again; but that, for the future, the national government will be able to protect itself.") (North Carolina ratifying convention, remarks of Mr. Iredell).

Although this self-protection rationale has little relevance for the question of congressional representation, other statements by Madison concerning the rationale for the District Clause suggest he did not view the District as the constitutional equivalent of a state. *See, e.g.*, THE FEDERALIST NO. 43, *supra*, at 289 (arguing that "the gradual accumulation of public improvements at the stationary residence of the Government, would be . . . too great a public pledge to be left in the hands of a single State"); *see also* JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787, WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 332 (Gaillard Hunt & James Brown Scott eds., 1970) (noting George Mason's objection that having national capital and a state capital at the same place would give "a provincial tincture to your national deliberations").

[26] *Cf. U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 791-92 (1995) (noting that Court has used ratification debates to confirm Framers' understanding of Article I) (citing *Powell v. McCormack*, 395 U.S. 486 (1969)).

[27] *See also* BOWLING, *supra* note 25, at 82 (noting that opponents of Constitution charged that District residents "would be subject to a government with absolute authority over them but in which they were unrepresented").

In FEDERALIST NO. 43, Madison expressed the view that inhabitants of the District will have acquiesced in cession, "as they will have had their voice in the election of the Government which is to exercise authority over them . . . ." THE FEDERALIST NO. 43, *supra*, at 289. As plaintiffs concede, this is generally understood as a reference to the fact that before cession the residents would "have had" a voice in that decision, not a suggestion that they would have a voice in

convention, Alexander Hamilton proposed that the Constitution be amended to provide: "When the Number of Persons in the District or Territory to be laid out for the Seat of the Government of the United States . . . amount to ___ [an unspecified number] . . . Provision shall be made by Congress for having a District representation in that Body." 5 THE PAPERS OF ALEXANDER HAMILTON 189-90 (Harold C. Syrett & Jacob E. Cooke eds., 1962). The proposed amendment failed. *See id.*

Considerably more evidence of the contemporary understanding emerges from examination of the period immediately surrounding Congress' assumption of exclusive jurisdiction over the land ceded for the District by Maryland and Virginia.[28] During that period, some residents of the District sought to dissuade Congress from passing the Organic Act of 1801, 2 Stat. 103 (1801), through which jurisdiction was to be assumed. They believed that, under the Constitution, once Congress assumed jurisdiction they would necessarily lose their vote and be "reduced to the mortifying situation, of being subject to laws made, or to be made, by we know not whom; by agents, not of our choice, in no degree responsible to us." ENQUIRIES INTO THE NECESSITY OR EXPEDIENCY OF ASSUMING EXCLUSIVE LEGISLATION OVER THE DISTRICT OF COLUMBIA 15 (1800) [hereinafter ENQUIRIES INTO THE NECESSITY] (available in Rare Book/Special Collections Reading Room, Library of Congress).[29] Members of Congress opposed to the Organic

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Congress thereafter. *See* Mem. Amici Curiae for Professors James D.A. Boyle et al. at 21 n.13; Raven-Hansen, *supra*, at 172 n.24.

[28] *Cf. U.S. Term Limits, Inc.*, 514 U.S. at 816 (examining 1807 congressional debates as "further evidence of the general consensus" regarding meaning of Article I, section 2, clause 2).

[29] Paralleling our analysis in the previous section, the author of this letter to Congress wrote that "we cannot hope to have our situation ameliorated" by the Constitution for two reasons. ENQUIRIES INTO THE NECESSITY, *supra*, at 16. First, he noted:

> In the 2d Section of the 1st article, the rule of representation is settled. "The House of Representatives shall be composed of members, chosen every second year, by the people of the several states," but if we cease to be of any state, we can derive no benefit from that clause.

Id. Second, he noted that the same section also "excludes us from the privilege of voting for members of congress" because

Act made the same argument. *See, e.g.*, 10 ANNALS OF CONG. 992 (1801) (remarks of Rep. Smilie) (arguing that upon assumption of congressional jurisdiction, "the people of the District would be reduced to the state of subjects, and deprived of their political rights"). Even those who supported the Act appeared to agree that, under the Constitution, once Congress assumed jurisdiction the residents would automatically lose their right to vote. *See, e.g.*, *id.* at 996 (remarks of Rep. Bird) (noting that although "the people [of the District] could not be represented in the General Government," the "blame" was not "to the men who made the act of cession; not to those who accepted it," but "to the men who framed the Constitutional provision, who peculiarly set apart this as a District under the national safeguard and Government").[30]

Others saw a constitutional amendment – rather than blocking Congress' assumption of jurisdiction – as the best way to preserve the franchise for the District's residents. *See, e.g.*, 10 ANNALS OF CONG. 998-99 (1801) (remarks of Rep. Dennis) ("[I]f it should be necessary, the Constitution might be so altered as to give them a delegate to the General

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> [T]he provision is, that 'the electors in each state shall have the qualification requisite for electors of the most numerous branch of the state legislature,' and if we are not qualified to vote for the state legislature, we are not qualified to vote for members of congress.

Id. at 18-19.

[30] Other debates concerning the District also reflected the understanding that District residents would lack a vote in the national Congress. *See* FEDERAL GAZETTE & BALTIMORE DAILY ADVERTISER, Feb. 21, 1801, at 2 (remarks of Rep. Gallatin) ("[T]his was not the fault of the present congress: if any fault, it laid with the [constitutional] convention, who expressly provided that exclusive jurisdiction should be assumed, and therefore the people [of the District] could not be represented in the general government."); FEDERAL GAZETTE & BALTIMORE DAILY ADVERTISER, Feb. 26, 1801, at 2 (reporting that "Mr. Nicholson, as a representative of the state of Maryland could not avoid expressing his opinion, upon a subject so highly interesting to a part of the people of that state, who were divested, by the assumption of jurisdiction, . . . of the right of voting for . . . the house of representatives to the general government. There ought to be, in his opinion, some weighty reasons urged why they should not be possessed with other rights as great, in the election of their local legislature."); WASHINGTON FEDERALIST, Mar. 3, 1801, at 2 (reporting same statement by Rep. Nicholson) [all sources available in Newspaper and Current Periodical Reading Room, Library of Congress].

Legislature, when their numbers should become sufficient."). In 1801, Augustus Woodward, a prominent lawyer who practiced in the District of Columbia, published a pamphlet decrying the area's lack of congressional representation, calling it a violation of "an original principle of republicanism, to deny that all who are governed by the laws ought to participate in the formation of them." AUGUSTUS WOODWARD, CONSIDERATIONS ON THE TERRITORY OF COLUMBIA 5-6 (1801) (available in Rare Book/Special Collections Reading Room, Library of Congress).[31] Woodward called for representation of the District in the Senate and the House, but recognized that "[i]t will require an amendment to the Constitution of the United States." *Id.* at 6. Accordingly, he proposed one. *See id.* at 15.[32]

Within a few years of the assumption of congressional jurisdiction, still others saw retrocession of the District to Maryland and Virginia as the only remedy for the "political slave[ry]" of nonrepresentation. 12 ANNALS OF CONG. 487 (1803) (remarks of Rep. Smilie); *see id.* ("Under our exercise of exclusive jurisdiction the citizens here are deprived of all political rights, nor can we confer them. . . . Why not then restore the people to their former condition?"). In 1803, a bill calling for retrocession was introduced in Congress. *See id.* at 487-506. Although the bill was defeated, *see id.* at 506, the residents of the former Virginia territory eventually succeeded in obtaining retrocession in 1846, *see* An Act to Retrocede the County of Alexandria, in the District of Columbia, to the State of Virginia, 9 Stat. 35 (1846).[33]

[31] Woodward was a friend and protégé of Thomas Jefferson, who appointed him judge of the Supreme Court of the Michigan Territory in 1805. *See* Richard P. Cole, *Law and Community in the New Nation: Three Visions for Michigan, 1788-1831*, 4 S. CAL. INTERDISC. L.J. 161, 196-98 (1995).

[32] In another pamphlet, written under the pseudonym Epaminondas, Woodward opposed the suggestion that "it is better for Congress never to assume the jurisdiction." 5 EPAMINONDAS ON THE GOVERNMENT OF THE TERRITORY OF COLUMBIA 9 (1801) (available in Rare Book/Special Collections Reading Room, Library of Congress). Constitutional amendment was to be preferred, he said, and was "the *exclusive* and *only* remedy." *Id.* (emphasis in original).

[33] In 1818, President Monroe, who had been a delegate to the Virginia ratifying convention, noted that the people of the District of Columbia "have no participation" in Congress' exercise of power over them, and asked Congress to

Although the foregoing represents positive evidence of a contemporary understanding that District residents would not (and did not) have the right to vote in Congress, perhaps more important is the absence of evidence to the contrary. No political leaders, for example, assured the residents that they would have representation even without constitutional amendment or defeat of the Organic Act. Nor is there any indication that the residents of the new District were surprised when they found themselves without the vote after Congress assumed exclusive jurisdiction in 1801. Indeed, had it been understood that the former citizens of Maryland and Virginia had a right to continue voting for Congress, one would have expected a flood of newspaper articles and lawsuits decrying their unlawful disenfranchisement. Such a reaction, however, is not visible in the historical record.[34]

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consider "whether an arrangement better adapted to the principles of our Government" might be possible. 33 ANNALS OF CONG. 18 (1818). No specific arrangement was proposed. *See generally* 3 STORY, *supra* note 25, § 1218 (1833) (noting that inhabitants of the District "are not indeed citizens of any state, entitled to the privileges of such, but are citizens of the United States" and that "[t]hey have no immediate representatives in congress").

[34] *See e.g.*, COLUMBIAN MIRROR & ALEXANDRIA GAZETTE (Alexandria, Va.), Apr. 13, 1799 through Dec. 6, 1800 (further dates unavailable); FEDERAL GAZETTE & BALTIMORE DAILY ADVERTISER (Baltimore, Md.), July 1, 1800 through Dec. 31, 1801 (further dates unavailable); WASHINGTON FEDERALIST (Georgetown, D.C.), Sept. 25, 1800 through Dec. 29, 1802 [all sources available in Newspaper and Current Periodical Reading Room, Library of Congress]. To the contrary, the newspapers extensively reported the congressional debates on the Organic Act, which frequently expressed the understanding that District residents would not have a vote in Congress. *See, e.g.*, FEDERAL GAZETTE, Feb. 19, 1801, at 2 (remarks of Rep. Smilie); WASHINGTON FEDERALIST, Feb. 24, 1801, at 2 (same); *see also* FEDERAL GAZETTE, Feb. 19, 1801, at 2 (remarks of Rep. Dennis); FEDERAL GAZETTE, Feb. 21, 1801, at 2 (remarks of Rep. Gallatin); FEDERAL GAZETTE, Feb. 26, 1801, at 2 (remarks of Rep. Nicholson).

A resident of the former Virginia territory did sue for the right to vote in Virginia state elections. *See Custis v. Lane*, 17 Va. (3 Munf.) 579 (1813). The Virginia Supreme Court, however, rejected the claim on the ground that plaintiff was no longer a citizen of that state. Reflecting the same understanding as that in the congressional debates, the court held: "That he is no longer within the jurisdiction of the commonwealth of Virginia, is manifest from this consideration, that congress are vested, by the constitution, with exclusive power of legislation over the territory in question . . . ." *Id.* at 591.

3. Finally, we note that every other court to have considered the question -- whether in dictum or in holding -- has concluded that residents of the District do not have the right to vote for members of Congress. The early Supreme Court decisions are particularly relevant here, not only because they are binding upon us, but because they reflect the historical understanding of Chief Justice Marshall, who "wrote from close personal knowledge of the Founders and the foundation of our constitutional structure." *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 587 (1949) [hereinafter *Tidewater*] (plurality opinion of Jackson, J.).

In 1805, the Chief Justice considered whether the District of Columbia was a "state" within the meaning of the Judiciary Act of 1789, which effectuated Article III's grant of diversity jurisdiction by giving circuit courts authority over cases "between a citizen of the state in which the suit is brought, and a citizen of another state." *Hepburn & Dundas*, 6 U.S. (2 Cranch) at 452 (citing, without citation, 1 Stat. 73, 78 (1789)). Plaintiffs contended there, as they do here, that the word "state" can mean more than simply one of the members of the union. Although Marshall agreed that was true, in his view "the act of congress obviously uses the word 'state' in reference to the term used in the constitution." *Id.* Expressly relying on his understanding of the meaning of that term in the clauses that prescribe the composition of the House and the Senate, Marshall concluded that "state" could not encompass the District for purposes of Article III. "These clauses," he said, referring to the clauses of Article I, "show that the word state is used in the constitution as designating a member of the union." *Id.* at 452-53. Because the word "has been used plainly in this limited sense in the articles respecting the legislative and executive departments," he concluded, "it must be understood as retaining th[at] sense" in the article concerning the judicial branch. *Id.* at 453.

Marshall was not unaware of the unfairness his conclusion would engender. He felt constrained to reach it, however, notwithstanding that it was "extraordinary that the courts of the United States, which are open to aliens, and to the

citizens of every state in the union," should be closed to citizens of the United States who reside in the District. *Id.* at 453. Sixteen years later, Marshall reaffirmed *Hepburn & Dundas*'s conclusion in *Corporation of New Orleans v. Winter*, 14 U.S. (1 Wheat.) 91 (1816).

The dissent contends that Chief Justice Marshall's position has since been undermined by *Tidewater*, in which the Supreme Court held it constitutional for Congress to open the federal courts to an action by a citizen of the District of Columbia against a citizen of one of the states. But in so doing, a plurality of the Court reconfirmed Marshall's conclusion that the District was not a state within the meaning of Article III's grant of jurisdiction to the federal courts, holding instead that Congress had lawfully expanded federal jurisdiction beyond the bounds of Article III by using its Article I power to legislate for the District. *See Tidewater*, 337 U.S. at 600 (plurality opinion of Jackson, J.). Although two other Justices opined that Marshall's holding in *Hepburn & Dundas* should be reversed, even they limited their disagreement to Article III's Diversity Clause, taking pains to distinguish between constitutional clauses "affecting civil rights of citizens," such as that clause, and "the purely political clauses," among which they counted "the requirements that members of the House of Representatives be chosen by the people of the several states." *Id.* at 619-623 (Rutledge, J., concurring).

In 1820, Marshall reviewed a claim that, because District residents were unrepresented in Congress, the national legislature lacked the power to impose a direct tax upon the District. *See Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317 (1820). If there were a Justice who would have been particularly sensitive to this reprise of the Revolutionary War battle cry of "no taxation without representation," surely it would have been Marshall -- who served as a company commander at Valley Forge. *See* JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 62-65 (1996). Nonetheless, speaking for a unanimous Court, Marshall held that Congress had the power to tax residents of the District of Columbia

despite their lack of representation. *See Loughborough*, 18 U.S. (5 Wheat.) at 317. The District, he said, "relinquished the right of representation, and has adopted the whole body of Congress for its legitimate government." *Id.* at 324. "Although in theory it might be more congenial to the spirit of our institutions to admit a representative from the district," he declared, "certainly the Constitution does not consider their want of a representative in Congress as exempting it from equal taxation." *Id.* at 324-25.

The opinions do not end with those of Chief Justice Marshall. In *Heald v. District of Columbia*, Justice Brandeis also faced a claim that a congressional tax on the District was unconstitutional "because it subjects the residents of the District to taxation without representation." 259 U.S. 114, 124 (1922). Like Marshall, Brandeis recognized that "[r]esidents of the district lack the suffrage and have politically no voice in the expenditure of the money raised by taxation." *Id.* Nonetheless, he concluded that "[t]here is no constitutional provision which so limits the power of Congress that taxes can be imposed only upon those who have political representation." *Id.*; *see also Palmore v. United States*, 411 U.S. 389, 395 (1973) (citing, with approval, *Hepburn & Dundas*, 6 U.S. (2 Cranch) at 445).

The cry of "no taxation without representation" has reached the courts of this circuit as well. In *Breakefield v. District of Columbia*, the Court of Appeals considered a challenge to Congress' imposition of an income tax upon District residents "notwithstanding that they then had and now have no elected representative in the Congress." 442 F.2d 1227, 1228 (D.C. Cir. 1970). Petitioner acknowledged the existence of contrary precedent, namely the Supreme Court's decisions in *Loughborough* and *Heald*, but "question[ed] both the original soundness" of those decisions "and their continuing vitality in the light of later Supreme Court pronouncements." *Id.* at 1229. "[Petitioner] presents those contentions in the wrong forum," the court said. "[I]t is for the Supreme Court, not us, to proclaim error in its past rulings, or their erosion by its adjudications since." *Id.* at

1229-30. We are of the same view.

4. In sum, we conclude that constitutional text, history, and judicial precedent bar us from accepting plaintiffs' contention that the District of Columbia may be considered a state for purposes of congressional representation under Article I.

Before proceeding to plaintiffs' alternative argument, we pause over another advanced by the dissent. As noted at the outset of this Part, plaintiffs do not dispute that to succeed under Article I they must be able to characterize themselves as citizens of a state. Our dissenting colleague, however, does dispute that assumption, contending that the Article's repeated use of the word "state" does not necessarily mean the Framers intended to apportion representatives *only* among states. As the dissent correctly points out, "the legal maxim *expressio unius est exclusio alterius* ('the mention of one thing implies the exclusion of another') is not always correct." *In re Sealed Case*, 181 F.3d 128, 132 (D.C. Cir. 1999) (en banc). And we certainly should not resolve as important a question as that now before us by rote application of such a canon of construction.

This, however, is not a case where "[t]he 'exclusio' is . . . the result of inadvertence or accident." *Ford v. United States*, 273 U.S. 593, 612 (1927) (internal quotation omitted). As we have discussed above, the overlapping and interconnected use of the term "state" in the relevant provisions of Article I, the historical evidence of contemporary understandings, and the opinions of our judicial forebears all reinforce how deeply Congressional representation is tied to the structure of statehood.[35] The Constitution's repeated references to states cannot be understood, as the dissent urges, as merely the most practical method then available for holding elections. Rather, they are reflections of the Great Compromise forged to ensure the Constitution's ratification. There is simply no evidence that the Framers intended that not only citizens of states, but unspecified others as well, would share in the

[35] As we discuss below, this conclusion is not inconsistent with the fact that the right to vote for federal officers is a right of national citizenship. *See infra* Part V.B and note 69.

congressional franchise.

B

As an alternative to the argument that the District may be considered a state under Article I, the *Alexander* plaintiffs contend that residents of the District should be permitted to vote in congressional elections through Maryland, based on a theory of "residual" citizenship in that state. This theory depends heavily on the fact that residents of the land ceded by Maryland apparently continued to vote in Maryland elections during the period between the Act of 1790, by which Congress accepted the cession, and the Organic Act of 1801, by which Congress assumed jurisdiction and provided for the government of the District. We discuss that history and its implications below.

Although in the end we find that we cannot draw the same conclusion plaintiffs do from the historical record, we must begin by noting that there is a much greater obstacle to plaintiffs' success on this theory: it has already been rejected in a decision binding upon this court. In *Albaugh v. Tawes*, a three-judge district court considered a suit seeking a declaratory judgment "that the District of Columbia is a part of the State of Maryland for purposes of United States Senator elections." 233 F. Supp. 576, 576 (D. Md. 1964). Plaintiff's arguments were "based upon the fact that . . . during the period between 1790 and the 'Organic Act of 1801,' residents of the territory ceded by the State of Maryland may have been allowed to vote as residents" of that state. *Id.* at 578. The court rejected plaintiffs' claims, noting the Supreme Court's decision in *Reily v. Lamar* that former residents of Maryland lost their state citizenship upon "the separation of the District of Columbia from the State of Maryland." *Id.* (quoting *Reily v. Lamar*, 6 U.S. (2 Cranch) 344, 356-57 (1805)). *Albaugh* concluded that "residents of the District of Columbia have no right to vote in Maryland elections generally, and specifically, in the selection of United States Senators." *Id.* at 577.

The Supreme Court affirmed the decision of the three-judge court. *See Albaugh v. Tawes*, 379 U.S. 27 (1964) (per

curiam). Although the Supreme Court's affirmance was summary, the Court has reminded the lower courts that we are bound by such affirmances "until such time as the Court informs [us] that [we] are not." *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) (quoting *Doe v. Hodgson*, 478 F.2d 537, 539 (2d Cir. 1973)). The jurisdictional statement submitted to the Supreme Court in *Albaugh* raised the principal theories we consider in this Part, and also raised the "privileges or immunities" claim considered in Part V.[36] *Cf.* ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 219-20 (7th ed. 1993) (noting importance of evaluating issues raised in appeal papers); *see also Illinois State Bd. v. Socialist Workers Party*, 440 U.S. 173, 182-83 (1979); *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). Accordingly, the decision in *Albaugh* forecloses the conclusion that District residents may be allowed to vote in congressional elections through the State of Maryland. The Fourth Circuit has recently reached the same determination, in a case raising the same basic claim.[37]

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[36] The jurisdictional statement attacked the lower court opinion for failing to accept the significance of the fact that, through the effective date of the 1801 Organic Act, Maryland continued to designate its District lands as part of the state's federal congressional districts. *See* Jurisdictional Statement at 4-5, *Albaugh v. Tawes*, 379 U.S. 27 (1964) (No. 481) [hereinafter *Albaugh* Jurisdictional Statement]; *cf. infra* Part IV.B.2. It further argued that since "[t]he District of Columbia territory, like the rest of the State of Maryland, was a charter member of the United States," its citizens "have always been citizens of the State of Maryland and under the perpetual protection of the . . . 'equal privileges' clause." *Albaugh* Jurisdictional Statement at 7 (citing U.S. CONST. art. IV, § 2, cl. 1). This meant, plaintiff said, that the right of District citizens to vote could not constitutionally be denied. *See id.*; *cf. infra* Part IV.B.3; *infra* Part V.B. The jurisdictional statement also raised the claim, made by amicus here, that the Organic Act was not intended to "repeal[] the existing Maryland Congressional election regulations which defined the District of Columbia as a part of the State of Maryland," since it provided "that the laws of the State of Maryland, as they now exist, shall be and continue in force." *Albaugh* Jurisdictional Statement at 6 (quoting 2 Stat. 103, §1); *cf. infra* note 46.

[37] *See Howard v. State Admin. Bd.*, 122 F.3d 1061 (4th Cir. 1997) (unpublished opinion), *aff'g* 976 F. Supp. 350 (D. Md. 1996) (holding that plaintiff's argument, that as "a resident of the District of Columbia . . . he has the right to participate in congressional elections in the State of Maryland," is "foreclosed by" *Albaugh*). The Committee for the Capital City, amicus curiae here, was also amicus in *Howard*.

Even if *Albaugh* were not an impediment, however, we would still be unable to accept the "residual" citizenship theory advanced by plaintiffs. That theory fails because the Maryland citizenship of the District's inhabitants was extinguished upon the completion of the transfer of the seat of the national government to the territory of the District. We set forth our analysis in the following subsections.

1. The District Clause gave Congress the power to exercise exclusive legislation "over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of Government of the United States." U.S. CONST. art. I, § 8, cl. 17. In 1788, the General Assembly of Maryland had authorized and required its representatives to cede any district in the state for the national capital; Virginia did the same.[38] After protracted debate over sites offered by several states, Congress agreed upon a tract along the Potomac River; Maryland agreed to cede land along the eastern bank while Virginia agreed to cede land along the western.[39] Congress accepted the cessions by the Act of July 16, 1790, and established the first Monday of December 1800 as the date for the removal of the government to the District.[40] In 1791, Maryland ratified the

[38] *See* An Act to Cede to Congress a District of Ten Miles Square in This State for the Seat of Government of the United States, 2 Kilty Laws of Md., ch. 46 (1788); *see also* An Act for the Cession of Ten Miles Square, or Any Lesser Quantity of Territory Within This State, to the United States, in Congress Assembled, for the Permanent Seat of the General Government, 13 Va. Stat. at Large, ch. 32, at 43 (Hening 1823) (enacted 1789).

[39] *See generally* BOWLING, *supra* note 25, at 127-207.

[40] *See* An Act for Establishing the Temporary and Permanent Seat of the Government of the United States, 1 Stat. 130 (1790). The Act stated:

> SECTION 1. . . . That a district of territory, not exceeding ten miles square, to be located as hereafter directed on the river Potomac, at some place between the mouths of the Eastern Branch and Connogochegue, be, and the same is hereby accepted for the permanent seat of the government of the United States. *Provided nevertheless*, That the operation of the laws of the state within such district shall not be affected by this acceptance, until the time fixed for the removal of the government thereto, and until Congress shall otherwise by law provide.
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> . . . .
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> SEC. 6. . . . That on the said first Monday in December, in the year one thousand eight hundred, the seat of the government of the United States shall,

cession, stating that "all that part of the said territory called Columbia which lies within the limits of this State shall be . . . forever ceded and relinquished to the Congress and Government of the United States, and full and absolute right and exclusive jurisdiction, as well of soil as of persons residing or to reside thereon."[41]

Congress' acceptance of the cessions specified that the "seat of the government of the United States" would "be transferred to the district" on the "first Monday in December" of 1800. 1 Stat. 130, § 6. Until that time, Philadelphia was to serve as the seat of government. *See id.* § 5. During that interim, the acceptance statute provided that "the operation of the laws of the state [Maryland or Virginia, respectively] within such district shall not be affected by this acceptance, until the time fixed for the removal of the government thereto, and until Congress shall otherwise by law provide." *Id.* § 1. Similarly, in making their cessions, both Maryland and Virginia stipulated that their jurisdiction "over the persons and property of individuals residing within the limits of the cession" would "not cease until" Congress did "by law provide for the government thereof, under their jurisdiction, in the manner provided by the [District Clause] of the Constitution." 1791 Md. Acts ch. 45, § 2; 13 Va. Stat. at Large, ch. 32, at 43. On February 27, 1801, Congress passed the so-called "Organic Act," providing for the government and the administration of justice in the District of Columbia. *See* 2 Stat. 103.

There is evidence that during the period prior to the transfer of the seat of government to the District, the residents of the area continued to vote for Congress in Maryland and Virginia. *See* WILLIAM TINDALL, ORIGIN AND GOVERNMENT OF THE DISTRICT OF COLUMBIA 17 (1909); Raven-Hansen, *supra*, at 173-74. When the laws of those states ceased having force in the District, however, the states ceased treating District citizens

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by virtue of this act, be transferred to the district and place aforesaid. *Id.*

[41] An Act Concerning the Territory of Columbia and the City of Washington, 1791 Md. Acts ch. 45, § 2. As noted above, Congress retroceded the Virginia portion of the District in 1846.

as state citizens eligible to vote in their elections -- an event that occurred no later than February of 1801. *See Alexander* Am. Compl. ¶ 97; TINDALL, *supra*, at 17; Raven-Hansen, *supra*, at 174. Since that date, District residents have been unable to vote in either Maryland or Virginia.

2. The *Alexander* plaintiffs and several amici contend that the above-described history, and particularly the fact that residents of the area continued to vote in congressional elections into the year 1800, demonstrates that the Framers did not intend the cession of the states' lands to deprive their residents of the right to vote. As citizens of Maryland and Virginia, plaintiffs argue, the residents of the District were originally part of the "People of the several States," continued to vote even after the land was ceded to the national government, and hence "retain a residual citizenship in the state[s] from which the District was created." *Alexander* Pls.' Opp'n at 16. This "historical experience," they contend, "confirms that otherwise stateless citizens may retain prior state affiliation for purposes of exercising their constitutional right to vote." *Alexander* Pls.' Summ. J. Mem. at 51-52.

We are unable to draw this conclusion from the history recounted above. Contrary to plaintiffs' suggestion, the fact that residents of the Virginia and Maryland lands voted in those states into 1800 did not reflect an understanding that they would continue to do so after the District became the seat of government. Rather, it reflected the fact that during this period those lands were not yet the seat of government (Philadelphia was), but instead remained part of the ceding states. As the Circuit Court for the District of Columbia held in 1801, "Virginia did not part with her jurisdiction until congress could exercise it, which, by the [District Clause of the] constitution, could not be until the district became the seat of government." *United States v. Hammond*, 26 F. Cas. 96, 96 (C.C.D.C. 1801). That, the court held, occurred on "the first Monday of December, 1800" by virtue of the Act of 1790. *Id.*[42] In *Reily v. Lamar*, Chief Justice Marshall reached a

[42] In addition to the District Clause and the Act of 1790, the court relied on the proviso in the Virginia cession act, which stated that "the jurisdiction of the laws of this commonwealth over the persons and property of individuals residing

similar conclusion with respect to Maryland, although for the purposes of that case he found it "not material to inquire, whether the inhabitants of the city of Washington ceased to be citizens of Maryland on the 27th day of February 1801," when the Organic Act took effect, "or on the first Monday of December 1800." 6 U.S. (2 Cranch) 344, 357 (1805); *see also Young v. Bank of Alexandria*, 8 U.S. (4 Cranch) 384, 396 (1808) (Marshall, C.J.) ("[U]nder the terms of the cession and acceptance of the district, . . . the power of legislation remained in Virginia until it was exercised by congress."). The precise date is likewise immaterial for our purposes.[43]

In sum, during the interim period, the territory's residents continued to vote not as "residual" citizens of Maryland, but as actual citizens of that state.[44] Only thereafter did they lose their state citizenship, and with it their right to vote. *See* Raven-Hansen, *supra*, at 174 ("District residents did not lose state citizenship until December, 1800").[45] We thus conclude,

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within the limits of the cession aforesaid, shall not cease or determine, until congress, having accepted the said cession, shall by law provide for the government thereof, under their jurisdiction, in manner provided by the [District Clause]." *Hammond*, 26 F. Cas. at 97 (quoting 13 Va. Stat. at Large, ch. 32, at 43); *see also* 1791 Md. Acts ch. 45, §2 (parallel proviso in Maryland's ratification of its cession).

[43] The three-judge court in *Albaugh* held that "[s]ince the 'Organic Act of 1801,' it has been uniformly recognized . . . that residents of the District of Columbia are no longer citizens of the State of Maryland." 233 F. Supp. at 578.

[44] In *Hammond*, 26 F. Cas. at 99, the court held that "[b]y the constitution, congress could not exercise exclusive legislation over the district until it had become the seat of government." Even if we were to assume to the contrary that Congress acquired the authority to exercise exclusive control over the District in 1790, that would not change the analysis. Whatever Congress' *authority* may have been during the interim period, it left control of the area to Maryland and Virginia. Since 1801, however, Congress has continuously exercised exclusive authority over the District. It is thus unnecessary for us to consider whether District residents would be able to vote had Congress never exercised its authority, or had it subsequently ceded partial authority back to the state. *See* discussion of *Evans v. Cornman*, 398 U.S. 419 (1970), *infra* Part IV.B.4.

[45] In 1801, Maryland law provided that "[t]he election of representatives for the state to serve in congress, shall be made by the citizens of this state, qualified to vote for members of the house of delegates." A DIGEST OF THE LAWS OF MARYLAND 227 (Herty 1799). Maryland's Constitution, in turn, imposed, *inter alia*, a 12-month residency requirement on voting for members of the House of Delegates. *See* MD. CONST. of 1776, art. II, *reproduced in* 4 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 376 (William F. Swindler ed.,

in accord with the academic authority upon whom plaintiffs otherwise heavily rely, that this "decade of voting and representation provided no precedent for the representation of District citizens." *Id.*[46]

Nor is there any other evidence of an intent, or an understanding, that former residents of Maryland and Virginia would continue to vote in those states after the District was established.[47] To the contrary, both the Maryland and Virginia

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1975). The current Maryland Constitution provides that only those "resident of the State as of the time for the closing of registration next preceding the election, shall be entitled to vote." MD. CONST. art. I, § 1.

[46] The Committee for the Capital City, appearing as amicus curiae, contends that District residents retain their right to vote in Maryland because Maryland's laws were never effectively terminated in the District. *See* Br. of the Committee for the Capital City at 1-2. It notes that in accepting the ceded territory in 1790, Congress stated that "the laws of the state within such district shall not be affected . . . until Congress shall otherwise by law provide." *Id.* at 11 (quoting 1 Stat. 130, § 1). Congress never did "otherwise provide," the Committee argues, because the Organic Act of 1801 merely stated that "the laws of the state of Maryland, as they now exist, shall be and continue in force." *Id.* at 10 (quoting 2 Stat. 195, § 1). Hence, it contends, "Congress has never enacted legislation that repealed or superseded those Maryland laws, and therefore they still apply – by the express terms of the Act of 1801 establishing the District's local governance – to those persons living in that portion of the State of Maryland that was ceded to the federal government." *Id.* at 11-12.

This is simply a misinterpretation of the 1801 statute. By continuing the authority of Maryland's laws "as they now exist," Congress did nothing more than fix them (as they stood as of that date) as a part of the common law *of the District*, without such a provision the new District would have had no laws upon which to build. It did not, however, provide any continuing governmental or regulatory authority to Maryland. *See generally Brooks v. Laws*, 208 F.2d 18, 25 (D.C. Cir. 1953); *Hammond*, 26 F. Cas. at 98; *see also Reily*, 6 U.S. (2 Cranch) at 356-57. Indeed, Maryland had renounced any such authority. *See* 1791 Md. Acts ch. 45, § 2. In any event, in 1901 Congress expressly repealed the applicability to the District of acts of the Maryland Assembly, retaining only the common law and the British statutes in force in Maryland on February 27, 1801 (where consistent with provisions of the D.C. Code). *See* Act of March 3, 1901, ch. 854, 31 Stat. 1189, 1434. *See generally Brooks*, 208 F.2d at 25; *Williams v. United States*, 569 A.2d 97, 99 (D.C. 1989).

[47] One important piece of evidence of an understanding that District residents would not continue to vote in those states is contained in Article I, section 2, clause 2, which provides that no person may be a representative unless "an Inhabitant of that State in which he shall be chosen." U.S. CONST. art. I, § 2, cl. 2; *see also id.* art. I, § 3, cl. 3 (imposing same restriction on senators). Even if the residents of the District could be characterized as "residual citizens" of their former states, they

statutes ratifying the cession made clear that their former territory was "forever ceded and relinquished to the Congress and Government of the United States, and full and absolute right and exclusive jurisdiction, as well of soil as of persons residing or to reside thereon." 1791 Md. Acts ch. 45, § 2; *accord* 13 Va. Stat. at Large, ch. 32, at 43. The early judicial cases also made clear that "[b]y the separation of the district of Columbia from the state of Maryland, the complainant ceased to be a citizen of that state." *Reily*, 6 U.S. (2 Cranch) at 357; *accord Hammond*, 26 F. Cas. at 98; *see also Custis v. Lane*, 17 Va. (3 Munf.) 579 (1813) (holding that District resident could no longer vote in Virginia because he was no longer "a citizen of Virginia, abiding, or inhabiting therein, but passed, with that territory, from the jurisdiction of this commonwealth, by the act of cession"). Once again, such evidence as there is indicates that the contemporary understanding was that the territory's residents would lose their vote in their former states as soon as Congress assumed exclusive jurisdiction.[48] And, after that occurred and the residents did lose their vote, altogether missing from the public record is any outpouring of complaints that the franchise was being unlawfully withheld. *See supra* note 34 and accompanying text.

3. Intertwined with plaintiffs' above argument, that the creation of the District *was not* constitutionally intended to withdraw the right to vote in Maryland, is another argument: namely, that it *could not* have had that effect. The original residents of the District were among the people of the states by virtue of their citizenship in Maryland, plaintiffs argue, and they therefore had an inalienable right to vote that could not be withdrawn. Moreover, plaintiffs contend that right continues to inhere in those who currently are residents of

surely are not "inhabitants" thereof. Plaintiffs' theory would make the District the only area where all of the voters are constitutionally unqualified to serve as their own representatives.

[48] *See supra* Part IV.A.2; *see also* ENQUIRIES INTO THE NECESSITY, *supra*, at 15-16 (warning that effect of assumption of jurisdiction by Congress would be that "the Territory of Columbia [would] cease[] to be component parts of the states respectively, to which it formerly belonged," and that residents would thereby lose their "share in electing the members of congress").

the District. Our dissenting colleague offers a variation on this theme. Although he concludes that District residents should be permitted to vote in the District rather than Maryland, his rationale is the same: residents of the District had the right to vote prior to 1801; this was a right they were entitled to bequeath to their "political posterity"; and this right could not be removed by Maryland's act of cession or Congress' assumption of jurisdiction.

We cannot accept the argument that current residents of the District retain residual rights because other people, living 200 years earlier in the same place, had such rights. In the United States, personal rights generally do not "run with the land." Even if it could be argued that the right to vote was a privilege that irrevocably vested from "the moment the United States Constitution was ratified" in "every citizen living in what were then the thirteen states of the union," including the portions of Maryland and Virginia that would later become the District, Br. of the Committee for the Capital City at 1, the argument would not extend to the present plaintiffs. By virtue of the passage of 200 years, all of the plaintiffs -- whether by birth or a combination of birth and their ancestors' migration -- arrived on the scene after the land already had become a district whose residents, by constitutional contemplation, lacked a vote in the national Congress. Whatever rights the original residents of the area may have had, none of them are alive to press them before this court.

Moreover, upon close examination, this argument is not independent of the constitutional intent argument rejected above. At bottom, plaintiffs do not argue that notwithstanding the intent of the Constitution, the right to vote could not have been taken from District residents. They do not make that argument because their ultimate appeal is to the Constitution itself: they cannot argue both that the denial of their right to vote is unconstitutional, and that it is irrelevant whether the Constitution recognizes such a right.

Instead, plaintiffs argue that the Constitution gave them the right to vote upon its ratification in 1789, and that it was the Organic Act of 1801 -- not the Constitution -- that purportedly

took it away. As one group of amici put it, "It was . . . the exercise of federal jurisdiction over the District -- and not the text or intent of the Constitution itself – that denied D.C. residents their right to popular representation in the federal legislature." Mem. Amici Curiae for Professors James D.A. Boyle et al. at 16.

This, however, merely returns us to ground previously plowed. We have already concluded that it *is* the Constitution itself that is the source of plaintiffs' voting disability. Under Article I, voters for the House of Representatives must "have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. CONST. art. I. § 2, cl. 1. Because those who live in the District lack state residency, they cannot qualify to vote in Maryland's (or any other state's) elections, and hence cannot vote for its representatives in the House. *See* MD. CONST. art. I, § 1.[49] Thus, it was not the Organic Act or any other cession-related legislation that excluded District residents from the franchise, something we agree could not have been done by legislation alone. *Cf. Lucas v. Colorado*, 377 U.S. 713, 736 (1964) (holding that "an individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State's electorate").[50] Rather, exclusion was the consequence of the completion of the cession transaction – which transformed the territory from being part of a state, whose residents were entitled to vote under Article I, to being part of the seat of government, whose residents were not. Although Congress'

[49] Although the Equal Protection Clause "restrains the States from fixing voter qualifications which invidiously discriminate," *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966) (declaring Virginia poll tax unconstitutional), the Court has not questioned "the power of a State to impose reasonable residence restrictions on the availability of the ballot," *id.* at 666. *See Carrington v. Rash*, 380 U.S. 89, 96 (1965) (emphasizing that states are "free to take reasonable and adequate steps . . . to see that all applicants for the vote actually fulfill the requirements of bona fide residence"); *see also Saenz v. Roe*, 119 S. Ct. 1518, 1528 (1999) (noting that "Citizenship Clause of the Fourteenth Amendment expressly equates citizenship with residence").

[50] Nor did any of those statutes purport to disenfranchise District residents: none addressed the issue of voting rights at all.

exercise of jurisdiction over the District through passage of the Organic Act was the last step in that process, it was a step expressly contemplated by the Constitution. *See* U.S. CONST. art. I, § 8, cl. 17.[51]

4. We next consider an additional argument advanced in support of a right to vote in Maryland elections, this one based not only on the historical relationship between the District and Maryland, but also on the Supreme Court's ruling that residents of a federal enclave must be permitted to vote in the state from which the enclave was created. In *Evans v. Comman*, the Supreme Court struck down under the Fourteenth Amendment's Equal Protection Clause a Maryland residency requirement that prevented persons living on the grounds of the National Institute of Health (NIH) from voting in state and federal elections. 398 U.S. 419 (1970). NIH had become a federal reservation in 1953, when Maryland ceded jurisdiction over the property to the United States. *See id.* at 420-21. Fifteen years later, the state denied NIH residents the right to vote.

The Court began its analysis by noting that:

> Appellees clearly live within the geographical boundaries of the State of Maryland, and they are treated as state residents in the census and in determining congressional apportionment. They are not residents of Maryland only if the NIH ceased to be a part of Maryland when the enclave was created. However, that "fiction of a state within a state" was specifically rejected by this Court in *Howard v. Commissioners of Louisville*, 344 U.S. 624, 627 (1953),

[51] Plaintiffs also contend that the Overseas Citizens Voting Rights Act (OCVRA) of 1975, 42 U.S.C. § 1973ff-1, by which Congress required the states to permit overseas Americans to vote absentee in the last state in which they were domiciled, shows that Americans retain a residual citizenship in their former states where necessary to vindicate the right to vote in congressional elections. *See Alexander* Pls.' Summ. J. Mem. at 51-53. Congress premised the OCVRA on a "reasonable extension of the bona fide residence concept." *Attorney Gen. of Guam*, 738 F.2d at 1019 (quoting H.R. Rep. No. 94-649, at 7 (1975)). There is a significant distinction between extending the right to vote to individuals who themselves once lived in a specific state, and extending it to other individuals who never have, based on the fact that still others were residents of Maryland 200 years ago.

> and it cannot be resurrected here to deny appellees the right to vote.

Id. at 421-22. It then proceeded to consider whether the state could deny plaintiffs the vote on the ground that they were neither substantially interested in nor affected by state electoral decisions. *See id.* at 422. Maryland alleged that the plaintiffs were substantially less interested in state affairs than other Maryland residents because, under the Enclaves Clause, U.S. CONST. art. I, § 8, cl. 17, Congress had the power to exercise exclusive jurisdiction over the NIH.

The Supreme Court rejected the state's argument, noting that "the relationship between federal enclaves and the States in which they are located" had "changed considerably" over the years. *Evans*, 398 U.S. at 423. In particular, it noted that Congress had passed a series of statutes expressly permitting states to extend many of their laws to cover enclave residents, including their criminal, tax, unemployment, and workers' compensation laws. *See id.* at 424 (citing 18 U.S.C. § 13; 4 U.S.C. §§104-110; 26 U.S.C. § 3305(d); and 40 U.S.C. § 490). Moreover, it noted that plaintiffs were "required to register their automobiles in Maryland and obtain drivers' permits and license plates from the State; they are subject to the process and jurisdiction of State courts; they themselves can resort to those courts in divorce and child adoption proceedings; and they send their children to Maryland public schools." *Id.* All of this led the Court to conclude that

> In their day-to-day affairs, residents of the NIH grounds are just as interested in and connected with electoral decisions as they were prior to 1953 when the area came under federal jurisdiction and as are their neighbors who live off the enclave. In nearly every election, federal, state, and local, for offices from the Presidency to the school board, and on the entire variety of other ballot propositions, appellees have a stake equal to that of other Maryland residents.

Id. at 426. Accordingly, *Evans* held that NIH residents were "entitled under the Fourteenth Amendment to protect that

stake by exercising the equal right to vote." *Id.*

Plaintiffs here argue that since the residents of federal enclaves are entitled to vote under *Evans*, the residents of the District should be so entitled as well. There is some appeal to that argument, as Congress's authority to govern enclaves is identical to its authority over the District, and is conferred by the same clause of the Constitution. *See* U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . . [t]o exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may, by Cession of particular States . . . become the Seat of the Government . . . , and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . . .").[52]

But the fact that Congress may have identical *authority* over both the District and the enclaves is not dispositive, because the ultimate result in *Evans* rested on the fact that Congress had not *exercised* that authority over NIH.[53] As noted above, Congress had passed statutes permitting Maryland to exercise its own authority in the enclave, and Maryland had done so extensively. It was Maryland's exercise of authority over the plaintiffs in that case -- in areas as disparate as motor vehicle regulation, state court jurisdiction,

[52] Although the constitutional text indicates that Congress has "like Authority" over both the District and the enclaves, the text does refer to them differently. The District is described as being created by "Cession" of particular states, a word which indicates that thereafter the District would no longer be part of those states. Enclaves, on the other hand, are areas purchased with the consent of the legislature of the state "in which the Same shall be," which may explain why *Evans* viewed enclaves as remaining parts of the states from which they were created. We need not resolve the significance of this difference in constitutional language, however, because the difference in the way in which Congress has exercised its authority over enclaves and the District distinguishes this case from *Evans* in any event. *See* discussion *infra* pp. 59-60.

[53] Indeed, the three-judge district court whose decision the Supreme Court affirmed expressly distinguished that case from a hypothetical in which the federal government did assert exclusive jurisdiction over an enclave. *See Comman v. Dawson*, 295 F. Supp. 654, 656 (D. Md. 1969). For the same reason, the fact that Maryland's initial statute ceding NIH, like the statute ceding the District, gave the federal government the ability to exercise exclusive authority over NIH is not decisive, since Congress plainly did not do so.

and public education -- that gave them "a stake equal to that of other Maryland residents." *Evans*, 398 U.S. at 426. The case before us is plainly not analogous in this respect. Congress has ceded none of its authority over the District back to Maryland, and Maryland has not purported to exercise any of its authority in the District.[54]

Plaintiffs do not dispute this distinction, and as a consequence do not contend that they have a right to vote in elections for the Maryland state legislature. Instead, they argue that while the absence of the exercise of Maryland authority over District residents might mean they have an insufficient interest in elections to Maryland's own legislature, "District citizens have an equally vital stake in elections to Congress" as other Maryland residents. *Alexander* Pls.' Summ. J. Mem. at 27. Finding District residents qualified to vote for Congress but not for the Maryland legislature, however, would turn Article I on its head. As we have noted, Article I, section 2 states that "the [congressional] Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. CONST. art. I, § 2, cl. 1. Plaintiffs' enclave theory, by contrast, would permit residents of the District to vote in Maryland's congressional elections notwithstanding that they lack -- even under an *Evans* theory -- precisely those qualifications.

Finally, and most important, adopting plaintiffs' argument would require us to ignore the result in *Albaugh*, which barred District residents from voting in Maryland's elections for the United States Senate. *See* discussion *supra* pp. 43-45. We do not have the authority to do so. Although there may

[54] We disagree with the dissent's suggestion that Congress' delegation of authority to the District government puts the District's situation on a par with that of the NIH enclave in *Evans*. In the latter circumstance, Congress delegated authority to another sovereign (Maryland), and the Court held that sovereign could not treat two classes of residents (those within and without the enclave) differently. Here, by contrast, Congress has merely delegated some of its power to its own creature, the District government. The governmental structure through which Congress chooses to exercise its authority over the District -- provided it does not delegate that authority to another sovereign -- cannot be determinative of the voting rights of District residents.

be tension between *Evans* and *Albaugh*,[55] it is a tension that arises only if *Evans* is extended beyond its own holding in two ways: to a situation in which the ceding state no longer asserts any jurisdiction, and to a remedy limited to the right to vote in federal elections. *Albaugh*, on the other hand, is directly on point here without any extensions: it directly and expressly denies District residents a right to vote in Maryland's federal elections.

Plaintiffs contend that it is *Evans*, rather than *Albaugh*, that is the harbinger of the Supreme Court's future course. Whether that is true, however, is not for us to judge. As the Supreme Court has repeatedly admonished the lower courts, "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)). We must apply the law as it now stands and, until the Supreme Court instructs otherwise, that law is set forth in *Albaugh*.

5. Plaintiffs rightly note that the cession of the lands of Virginia and Maryland "did not take away any of the individual constitutional rights guaranteed to District citizens." *Alexander* Pls.' Summ. J. Mem. at 46. As the Supreme Court declared in *O'Donoghue v. United States*, "[t]he mere cession of the District of Columbia to the Federal government relinquished the authority of the states, but it did not take it

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[55] There appear to have been two steps to the *Evans* analysis. First, in rejecting the "fiction of a state within a state," the court rejected the suggestion that the NIH grounds ceased to be part of Maryland when the enclave was created. *See Evans*, 398 U.S. at 421. The rationale for this declaration was unstated, other than by reference to the Court's prior similar statement in *Howard*. Standing alone, this declaration would appear to be in tension with the affirmance in *Albaugh*, although a difference in the constitutional language describing the District and the enclaves could explain it. *See supra* note 52. As discussed above, however, the Court did not rest its decision on this first step, but instead went on to consider whether enclave residents had a stake in the elections equal to that of other Maryland residents. *See Evans*, 398 U.S. at 426.

out of the United States or from under the aegis of the Constitution." 289 U.S. 516, 541 (1933) (quoting *Downes v. Bidwell*, 182 U.S. 244, 260-61 (1901)).[56] Yet, as the same opinion also noted, "when a provision of the Constitution is invoked, the question which arises is, not whether the Constitution is operative" in the District or territories, "but whether the provision relied on is applicable." *Id.* at 542 (quoting *Downes*, 182 U.S. at 292). For the reasons set forth above, we conclude that the constitutional provisions plaintiffs rely upon here -- the clauses of Article I that provide for congressional voting -- are not applicable to residents of the District of Columbia.

V

In this Part, we consider plaintiffs' arguments based on provisions of the Constitution other than Article I. These include the Equal Protection, Privileges or Immunities, Due Process, and Republican Guarantee Clauses.

A

We first address the contention of the plaintiffs (and of our dissenting colleague) that the District's lack of representation in the House deprives its residents of the equal protection of the laws. *See Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (applying equal protection analysis to federal government under Fifth Amendment's Due Process Clause); *see also Buckley v. Valeo*, 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment is the same as that under the Fourteenth Amendment."). The plaintiffs allege that the lack of representation renders them unequal to the residents of the fifty states and of the federal enclaves.[57] And they further

[56] *See O'Donoghue*, 289 U.S. at 541 (holding that judges of District of Columbia are Article III judges whose salaries cannot be decreased). *But see id.* at 539-40 ("The object of the grant of exclusive legislation over the district was, therefore, national in the highest sense, and the city organized under the grant became the city, *not of a state*, not of a district, but of a nation.") (internal quotation omitted) (emphasis added).

[57] The *Adams* plaintiffs, but not the *Alexander* plaintiffs, also allege that their lack of representation renders them unequal to the residents of Alexandria County, Virginia (formerly a part of the District) as well as to the residents of the states

contend that because the right to vote is fundamental, such unequal treatment cannot be upheld unless it satisfies strict scrutiny – that is, unless it is "narrowly tailored to serve a compelling" government interest. *Alexander* Pls.' Summ. J. Mem. at 56 (quoting *Washington v. Glucksberg*, 117 S. Ct. 2258, 2268 (1997)). Because there is no compelling interest in denying District residents the vote, plaintiffs contend that the denial cannot satisfy strict scrutiny and hence must fall.[58]

We do not disagree that defendants have failed to offer a compelling justification for denying District residents the right to vote in Congress. As the dissent argues, denial of the franchise is not necessary for the effective functioning of the seat of government.[59] The problem, however, is that strict scrutiny does not apply in this case. Although equal protection analysis scrutinizes the validity of classifications drawn by executive and legislative authorities, *see, e.g.*, *Parham v. Hughes*, 441 U.S. 347, 358 (1979), the classification complained of here is not the product of presidential, congressional, or state action. Instead, as we have just concluded, the voting qualification of which plaintiffs complain is one drawn by the Constitution itself. The Equal Protection Clause does not protect the right of all citizens to vote, but rather the right "of all *qualified* citizens to vote." *Reynolds v. Sims*, 377 U.S. 533, 554 (1964) (emphasis added). "[T]he right to vote in federal elections is conferred by Art. I, § 2, of the Constitution," *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966), and the right to equal protection cannot overcome the line explicitly drawn by that Article. For that reason, even the absence of a compelling ground for denying District citizens the right to vote cannot result in the judicial grant thereof.

"which started their organized political lives as territories of the Unites States." *Adams* Mot. for Summ. J. at 51.

[58] Plaintiffs do not, however, contend that the Equal Protection Clause bars states from imposing state residency as a qualification for voting. *See supra* note 49.

[59] As noted above, the principal rationale noted by Madison for exclusive congressional control over the District – ensuring that Congress would not have to depend upon another sovereign for its protection – does not appear to be relevant to the issue of voting rights. *See supra* note 25.

This point is expressly made by the very cases plaintiffs cite in support of their equal protection argument: those establishing the doctrine of "one person, one vote." In those cases, the Supreme Court held that doctrine to require that, "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964); *see also Gray v. Sanders*, 372 U.S. 368 (1963) (applying same principle to state elections). Plaintiffs assert that, even if Article I were intended to deprive District residents of congressional representation – a result inconsistent with the one person, one vote principle – that deprivation cannot continue in light of the expansive application of the principle in modern equal protection analysis.

But the one person, one vote cases themselves make clear that the structural provisions of the Constitution necessarily limit the principle's application in federal elections. In *Reynolds v. Sims*, for example, the Court recognized that the allocation "to each of the 50 States, regardless of population" of two senators and at least one representative was inconsistent with one person, one vote. 377 U.S. at 571-72. Nonetheless, the Court said, "The system of representation in the two Houses of the Federal Congress is one ingrained in our Constitution, as part of the law of the land." *Id.* at 574. Moreover, and particularly relevant here, the Court declared that "[t]he developing history and growth of our republic cannot cloud the fact that, at the time of the inception of the system of representation in the Federal Congress, a compromise between the larger and smaller states on this matter averted a deadlock in the Constitutional Convention which had threatened to abort the birth of our Nation." *Id.* This, the Court said, rendered the composition of the House and Senate constitutionally compelled, and thus "inapposite and irrelevant to state legislative districting schemes." *Id.* at 573.

In *Gray v. Sanders*, the Court had previously reached the same conclusion regarding the electoral college system used in presidential elections, which does not allocate voting

strength in strict proportion to population, but which is nonetheless mandated by Article II, section 1 and the Twelfth Amendment. *See* 372 U.S. at 378.[60] And subsequently, in *Department of Commerce v. Montana*, 503 U.S. 442 (1992), the Court noted two additional (and one of the same) limitations upon the one person, one vote principle. That "general admonition," the Court said, "is constrained by three requirements. The number of Representatives shall not exceed one for every 30,000 persons; each State shall have at least one Representative; and the district boundaries may not cross state lines." *Id.* at 447-48[61]; *see also Wisconsin v. City of New York*, 517 U.S. 1, 14-15 (1996) ("[T]he Constitution itself, by guaranteeing a minimum of one representative for each State, made it virtually impossible in interstate apportionment to achieve the [one person, one vote] standard imposed by *Wesberry*.").

In sum, notwithstanding the force of the one person, one vote principle in our constitutional jurisprudence, that doctrine cannot serve as a vehicle for challenging the structure the Constitution itself imposes upon the Congress. *See Breakefield v. District of Columbia*, 442 F.2d 1227, 1228 & n. 4 (D.C. Cir. 1970) (rejecting contention that lack of representation rendered congressional tax on District unlawful under "one-man one-vote" decision in *Wesberry*). This analysis also forecloses plaintiffs' contention that the disparity between their treatment and that of enclave residents violates equal protection.[62] As we held in Part IV.A,

[60] "The inclusion of the electoral college in the Constitution, as the result of specific historical concerns," the Court said, "validated the collegiate principle despite its inherent numerical inequality . . . ." *Gray*, 372 U.S. at 378.

[61] The Court noted that "[t]he first and second requirements are set forth explicitly in Article I, § 2, of the Constitution," and that "[t]he requirement that districts not cross state borders appears to be implicit in the text and has been recognized by continuous historical practice." *Montana*, 503 U.S. at 448 n.14.

[62] The dissent contends that the Equal Protection Clause is also violated by the disparity in treatment between District residents and overseas voters. As discussed *supra* note 51, in the Overseas Citizens Voting Rights Act (OCVRA), 42 U.S.C. § 1973ff-1, Congress required the states to permit Americans living overseas to vote absentee in the last state in which they were domiciled. Although the constitutionality of the OCVRA has not been tested, it depends upon the validity of Congress' premise that the Act is a "reasonable extension of the bona fide residence

the inability of District residents to vote is a consequence of Article I. Similarly, as we discussed in Part IV.B.4, the contrasting ability of enclave residents to vote is not the consequence of legislative line drawing, but rather of the Supreme Court's decision in *Evans* that enclave residents have a constitutional right to vote – a holding we are unable to extend to District residents both because of distinctions between the manner in which Congress has exercised its authority over the enclaves and the District, and because of the Supreme Court's decision in *Albaugh*. *See* discussion *supra* Part IV.B.4. Hence, the differing treatment is the consequence not of legislative determinations but of constitutional distinctions. This court is without authority to scrutinize those distinctions to determine whether they are irrational, compelling, or anything in between.[63]

B

Plaintiffs also contend that the right to vote for members of Congress is a privilege of national citizenship. Although the Fourteenth Amendment's Privileges or Immunities Clause[64] is phrased as a protection of such privileges against

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concept" for individuals who once lived in a specific state. *Attorney Gen. of Guam*, 738 F.2d at 1019 (quoting H.R. REP. NO. 94-649, at 7 (1975)). The instant lawsuits, brought on behalf of all District residents regardless whether they have ever lived in a state, cannot rely on such a premise.

[63] One of the claims in the *Adams* complaint does challenge a species of legislative action: Congress' continued exercise of exclusive federal authority over the District – or at least over the private residential portions of the District outside of the National Capital Service Area (the part of the District containing the principal federal buildings and offices). The *Adams* plaintiffs contend that Congress' decision to exercise exclusive authority over the District in local matters, yet to cede similar authority to the states in the federal enclaves, violates equal protection. This claim, however, challenges Congress' continuing authority over the District *regardless* of whether District residents may vote for Congress. *See Adams* Pls.' Opp'n at 72 n.41 (stating that even if District residents had representatives in Congress, Congress' exercise of authority over local District matters would be unconstitutional as long as representatives from places other than District are members of that body). It thus does not come within our jurisdictional mandate to decide apportionment challenges, and we therefore remand it to the single-judge district court. *See* discussion *supra* Part II.

[64] "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ." U.S. CONST. amend. XIV, § 1.

abridgement by the states,[65] plaintiffs further contend that its protections "are incorporated against the federal government by the fifth amendment in the same fashion as are the principles of equal protection." *Alexander* Pls.' Opp'n at 11 (citing *Bolling*, 347 U.S. at 500).[66] The denial of District residents' right to vote, plaintiffs conclude, abridges this right of national citizenship in violation of the Constitution.

We do not disagree that the "right to vote for national officers" is a "right[] and privilege[] of national citizenship." *Twining v. New Jersey*, 211 U.S. 78, 97 (1908) (citing *Ex parte Yarbrough*, 110 U.S. 651 (1884)); *accord In re Quarles*, 158 U.S. 532, 535 (1895). Nor do we dispute Justice Kennedy's statements, in a concurrence repeatedly cited by plaintiffs, that this right arises out of the "relationship between the people of the Nation and their National Government, with which the States may not interfere." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 845 (1995) (Kennedy, J., concurring); *see id.* at 844 ("[T]he federal right to vote . . . do[es] not derive from the state power in the first instance but . . . belong[s] to the voter in his or her capacity as a citizen of the United States.").[67] Indeed, as we noted above, it is Article I, section 2 that confers "the right to vote in federal elections." *Harper*, 383 U.S. at 665; *accord U.S. v Classic*, 313 U.S. 299, 314-15 (1941). That, however, can hardly be the end of the inquiry, as even plaintiffs concede that residents of the territories do not have the right to vote in congressional elections, notwithstanding that they, too, are national (American) citizens. *Cf. Igartua de la Rosa v. United States*,

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[65] Plaintiffs do not rely on the "Privileges and Immunities" Clause of Article IV. *See* U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

[66] Although the House defendants dispute this proposition, *see* House Opp'n to Pls.' Mot. for Summ. J. at 34, our disposition of plaintiffs' claim makes it unnecessary to decide the issue.

[67] *See also U.S. Term Limits, Inc.*, 514 U.S. at 805 (noting that "'[w]hile, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states,'" in fact it "was a new right, arising from the Constitution itself") (quoting *United States v. Classic*, 313 U.S. 299, 314-15 (1941)); *id.* at 820-21 (noting "that the right to choose representatives belongs not to the States, but to the people").

32 F.3d 8 (1st Cir. 1994); *Attorney Gen. of Guam v. United States*, 738 F.2d 1017 (9th Cir. 1984).[68]

Rather, it is precisely because it is Article I that confers the federal right to vote that we must look to that Article to provide its content and define its boundaries. Article I grants that right only to those who "have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. CONST. art. I, § 2, cl. 1.[69] Furthermore, it apportions representatives only "among the several States which may be included within this Union." *Id.* art. I, § 2, cl. 3. Thus, in Justice Kennedy's own words, the "Constitution uses state boundaries to fix the size of congressional delegations." *U.S. Term Limits, Inc.*, 514 U.S. at 841 (Kennedy, J.,

[68] While our dissenting colleague does not dispute the national citizenship of territorial residents, he does distinguish them from District residents on two grounds. First, he argues that the territories were never part of the "several States," and hence that their current residents are not the political posterity of individuals who at one time were "people of the several States." Whether or not this distinction is constitutionally significant, a point addressed *supra* Part IV.B, it proceeds from the premise that it is Article I (from which the quoted phrases are taken) that gives content to the "national" right to vote. But Article I, as we explain below, is precisely what withholds that right from District residents. The dissent also contends that the territories may be distinguished from the District on the ground that they were expected eventually to become states, thus rendering their condition temporary. Although it may be possible to distinguish the territories in this way, the Supreme Court relied on just that distinction to hold that although territorial residents came within the protection of (the then-existing version of) 42 U.S.C. § 1983, District residents did not. *See District of Columbia v. Carter*, 409 U.S. 418, 431-32 (1973) ("[I]n light of the transitory nature of the territorial condition, Congress could reasonably treat the Territories as inchoate States, quite similar in many respects to the States themselves, to whose status they would inevitably ascend. The District of Columbia, on the other hand, is an exceptional community . . . established under the Constitution as the seat of the National Government.") (internal quotation omitted).

[69] This does not, as both Justice Kennedy's concurrence and prior opinions of the Court make clear, mean that "electors for members of Congress owe their right to vote to the State law." *U.S. Term Limits, Inc.*, 514 U.S. at 842 (Kennedy, J., concurring) (quoting *Ex parte Yarbrough*, 110 U.S. at 663-64). Rather, "even though the Constitution uses the qualifications for voters of the most numerous branch of the States' own legislatures to set the qualifications of federal electors, Art. I, § 2, cl. 1, when these electors vote, we have recognized that they act in a federal capacity and exercise a federal right." *Id.* at 842. In short, the Constitution incorporates, or "adopts the qualification thus furnished as the qualification of its own electors for members of Congress." *Ex parte Yarbrough*, 110 U.S. at 663.

concurring).[70] Because we have previously concluded that the District cannot be characterized as a state for these purposes, and because therefore the constitutional provision that creates the federal right to vote does not include District residents within its terms, denial of the vote to those residents does not abridge their national privileges or immunities.

In further support of the privileges or immunities argument, plaintiffs reason by analogy to the arguments that prevailed in *U.S. Term Limits, Inc.* In that case, the Supreme Court struck down an Arkansas law that limited the state's congressional representatives to a fixed number of terms. In so doing, the Court relied not on the Privileges or Immunities Clause, but on the two Qualifications Clauses that set forth the qualifications for members of Congress. *See* U.S. CONST. art. I, § 2, cl. 2; *id.* art. I, § 3, cl. 3.[71] Just as Arkansas "violated its citizens' privileges of national citizenship when it attempted to restrict their right to vote for the congressional representatives of their choice," plaintiffs argue, "[t]he defendants here violate the same constitutional privilege by denying the right of District residents to vote in Congressional elections." *Alexander* Pls.' Summ. J. Mem. at 41.

For two reasons, *U.S. Term Limits* has no application to the instant controversy. First, the congressional Qualifications Clauses at issue in that case are the structural opposites of the voter Qualifications Clause at issue here. The former set forth specific lists of qualifications that members of Congress must satisfy. *See supra* note 71. The Court held those lists to be exclusive, striking down Arkansas' term limits on the ground that the state was without authority to add to them.

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[70] *See also U.S. Term Limits, Inc.*, 514 U.S. at 840 (Kennedy, J., concurring) ("[T]he Constitution takes care both to preserve the States and to make use of their identities and structures at various points in organizing the federal union.").

[71] The Qualifications Clause for the House of Representatives reads: "No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen." U.S. CONST. art. I, § 2, cl. 2. The analogous clause for the Senate reads: "No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen." *Id.* art. I., § 3, cl. 3.

See U.S. Term Limits, Inc., 514 U.S. at 806. By contrast, the voter Qualifications Clause, U.S. CONST. art. I, § 2, cl. 1, contains no such list, but rather merely incorporates the relevant state's own set of voter qualifications. *See U.S. Term Limits, Inc.*, 514 U.S. at 806 (noting "explicit[] contrast[]" between "state control over the qualifications of electors [and] the lack of state control over the qualifications of the elected").

Second, and more fundamentally, the denial of District residents' right to vote is not the consequence of the addition of any extra-constitutional qualification on voting, as in *U.S. Term Limits*. Rather, it is the result of applying precisely those qualifications contained in the Constitution itself. *See supra* Part IV. Accordingly, plaintiff's exclusion from the franchise violates neither the principles of *U.S. Term Limits*, nor the dictates of the Privileges or Immunities Clause.

C

Plaintiffs contend that the right to vote in congressional elections is also protected by the Due Process Clause of the Fifth Amendment, which provides that no person shall be "deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. Because the right to vote for one's own legislators is one of those protected liberties, plaintiffs argue, its denial violates their right to both procedural and substantive due process. *See Alexander* Pls.' Summ. J. Mem. at 27.

Like the privileges or immunities argument, this contention founders upon its underlying assumption: that District residents have a right to vote in congressional elections. As we have repeatedly stated above, the Constitution does not grant that right except to individuals who qualify under Article I – which District residents do not. Nor can the Due Process Clause, any more than the Equal Protection Clause, be used to change elements of the composition of Congress that are dictated by the Constitution itself. *Cf. Carliner v. Commissioner*, 412 F.2d 1090, 1090 (D.C. Cir. 1969) (rejecting argument that Due Process Clause rendered District's mayor-

commissioner and city council unlawful "because the citizens of the District have not been given the opportunity by popular vote to elect" them).[72]

D

Plaintiffs' final claim is based on the Republican Guarantee Clause of Article IV, which states: "The United States shall guarantee to every State in this Union a Republican Form of Government . . . ." U.S. CONST. art. IV, § 4. Although recognizing that the Clause is phrased as a guarantee to the states, plaintiffs once again contend that the "Framers cannot have intended anything less for the citizens of the federal government." *Alexander* Pls.' Summ. J. Mem. at 43. Plaintiffs argue that the guarantee of a republican form of government is incompatible with their exclusion from representation in Congress.

As the Supreme Court has noted, "[i]n most of the cases in which the Court has been asked to apply the [Guarantee] Clause, the Court has found the claims presented to be nonjusticiable under the 'political question' doctrine." *New York v. United States*, 505 U.S. 144, 184 (1992); *accord Baker v. Carr*, 369 U.S. 186, 218-27 (1962). But even if plaintiffs' claim is justiciable,[73] it does not present a substantial federal question.[74] While we cannot be certain precisely what the Framers thought constituted a "Republican Form of Government," we do know that they intended the District to be subject to the exclusive control of Congress, *see* U.S.

[72] The Supreme Court has also held that the "procedural component of the Due Process Clause does not 'impose a constitutional limitation on the [legislative] power of Congress . . . .'" *Atkins v. Parker*, 472 U.S. 115, 129 (1985) (quoting *Richardson v. Belcher*, 404 U.S. 78, 81 (1971)).

[73] *Cf. New York*, 505 U.S. at 185 (suggesting, without deciding, that "perhaps not all claims under the Guarantee Clause present nonjusticiable political questions").

[74] *Cf. Carliner*, 412 F.2d at 1091 (holding insubstantial the claim that then-existing city council was unlawful because not elected by District residents); *Breakefield*, 442 F.2d at 1229. *See generally Shook v. District of Columbia Fin. Responsibility & Management Assistance Auth.*, 132 F.3d 775, 781 (D.C. Cir. 1998) (holding that "Congress' authorization to the Control Board to reduce, even drastically, the powers of the [elected] Board of Education does not raise an independent constitutional issue").

CONST. art. I, § 8, cl. 17; that they reserved the power to elect congressional representatives exclusively to those qualified to vote in state elections, *see id.* art. I, § 2, cl. 1; and that District residents are not so qualified, *see* discussion *supra* Part IV. Accordingly, we cannot adopt plaintiffs' Republican Guarantee argument without concluding that Article IV of the Constitution was intended to repeal the provisions of Article I. That, of course, we cannot do.

E

Plaintiffs argue that, even if we cannot find that Article I guarantees their right to vote in congressional elections, we should harmonize that Article with the other provisions discussed in this Part, which, they contend, do protect such a right. We do not disagree that we should strive to read the Constitution in a way that harmonizes its various provisions. We believe, however, that we have done so in the only way the words and historical interpretation of that document permit. Although the provisions considered in this Part protect rights guaranteed by the Constitution, our reading of Article I precludes the conclusion that the right plaintiffs seek to vindicate is one of those. Because the provisions of the Constitution that set forth the composition of Congress do not contemplate representation for District residents, we conclude that the denial of representation does not deny them equal protection, abridge their privileges or immunities, deprive them of liberty without due process, or violate the guarantee of a republican form of government.

VI

As we have noted, many courts have found a contradiction between the democratic ideals upon which this country was founded and the exclusion of District residents from congressional representation. All, however, have concluded that it is the Constitution and judicial precedent that create the contradiction.[75] Moreover, that precedent is of particularly

[75] *See* cases cited *supra* Part IV.A.3; *see also United States v. Thompson*, 452 F.2d 1333, 1341 (D.C. Cir. 1971) ("[F]or residents of the District, the right to vote in congressional elections is . . . totally denied. This regrettable situation is a

strong pedigree. As Justice Jackson said in following Chief Justice Marshall's opinion that the District was not a state within the meaning of Article III:

> Among his contemporaries at least, Chief Justice Marshall was not generally censured for undue literalness in interpreting the language of the Constitution to deny federal power and he wrote from close personal knowledge of the Founders and the foundation of our constitutional structure. Nor did he underestimate the equitable claims which his decision denied to residents of the District . . . .

Tidewater, 337 U.S. at 586-87 (plurality opinion of Jackson, J.) (citing *Hepburn & Dundas*, 6 U.S. (2 Cranch) at 453).

Like our predecessors, we are not blind to the inequity of the situation plaintiffs seek to change. But longstanding judicial precedent, as well as the Constitution's text and history, persuade us that this court lacks authority to grant plaintiffs the relief they seek. If they are to obtain it, they must plead their cause in other venues. Accordingly, plaintiffs' motions for summary judgment are denied, and defendants' motions to dismiss are granted with respect to those claims that challenge the constitutionality of the apportionment of the House of Representatives. The remaining claims are remanded to the single district judge before whom they were originally filed.

An order accompanies this memorandum.

March 20, 2000.

S/ MERRICK B. GARLAND
United States Circuit Judge

S/ COLLEEN KOLLAR-KOTELLY
United States District Judge

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product of historical and legal forces over which this court has no control."); *cf. Representation for the District of Columbia: Hearings Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 95th Cong. 131 (1978) (statement of Patricia M. Wald, Assistant Attorney General) (explaining that "constitutional amendment is necessary" to provide District with voting representation because "we do not believe that the word 'state' as used in Article I can fairly be construed to include the District").

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LOIS E. ADAMS, *et al.*, Plaintiffs, v. WILLIAM JEFFERSON CLINTON, *et al.*, Defendants.	)	Civ. No. 98–1665 (LFO, MBG, CKK)
CLIFFORD ALEXANDER, *et al.*, Plaintiffs, v. WILLIAM M. DALEY, *et al.*, Defendants.	)	Civ. No. 98–2187 (LFO, MBG, CKK)

JUDGMENT

FILED
Mar[ch] 20, 2000
Nancy Mayer-Whittington, Clerk
U.S. District Court

For the reasons stated in the accompanying Memorandum Opinion, it is, this 20th day of March, 2000, hereby

ORDERED that the Motion by Twenty Citizens of the District of Columbia for Summary Judgment in Civ. No. 98-1665 [#94] is DENIED with respect to those claims that challenge the constitutionality of the apportionment of congressional districts; and it is further

ORDERED that President Clinton's Motion to Dismiss in Civ. No. 98-1665 [#34] is GRANTED with respect to those claims that challenge the constitutionality of the apportionment of congressional districts; and it is further

ORDERED that the Motion to Dismiss of Defendants Robin H. Carle and Wilson Livingood in Civ. No 98-1665 [#33] is GRANTED with respect to those claims that challenge the constitutionality of the apportionment of congressional districts; and it is further

ORDERED that the Motion of Plaintiffs Alexander et al. for Summary Judgment in Civ. No. 98-2187 [#52] is DENIED with respect to those claims that challenge the constitutionality of the apportionment of congressional districts; and it is further

ORDERED that the Motion to Dismiss of defendants William M. Daley and the United States in Civ. No. 98-2187 [#78] is GRANTED with respect to those claims that challenge the constitutionality of the apportionment of congressional districts; and it is further

ORDERED that the Motion to Dismiss of Defendants Robin H. Carle, Wilson Livingood and James M. Eagen III in *Alexander, et al v. Daley, et al.* in Civ. No. 98-2187 [#84] is GRANTED with respect to those claims that challenge the constitutionality of the apportionment of congressional districts; and it is further

ORDERED that all remaining motions and claims be REMANDED to the single district judge to whom the cases were originally assigned.

SO ORDERED.

S/ MERRICK B. GARLAND
United States Circuit Judge

S/ COLLEEN KOLLAR-KOTELLY
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LOIS E. ADAMS, *et al.*,	)	
Plaintiffs,	)	Civ. No. 98–1665
v.	)	(LFO, MBG, CKK)
WILLIAM JEFFERSON CLINTON,	)	
et al., Defendants.	)	

MOTION TO RELIEVE PLAINTIFFS LOIS E. ADAMS, *et al.*, OF JUDGMENTS ENTERED ON MARCH 20, 2000 BY THE THREE-JUDGE DISTRICT COURT

Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, Plaintiffs *Lois E. Adams, et al.*, in Civil Action number 98-1665-LFO, MBG, CKK, ask this honorable Three-judge District Court of the District of Columbia to relieve them from the judgements entered by this Court on March 20, 2000. In support of this request, Plaintiffs state:

1. On June 30, 1998, the law suit styled *Lois E. Adams, et al., v. William Jefferson Clinton, et al.*, was filed in the United States District Court for the District of Columbia and assigned civil action number 98-1665-LFO.

2. Almost four months later, another law suit styled *Clifford Alexander, et al., v. William M. Daley, et al.*, was filed in the same court and assigned civil action number 98-2187-LFO.

3. The claims presented in *Adams* and *Alexander*, respectively, are categorically different responses to the District's situation and these claims and the arguments presented in each case in support of them are in almost diametric opposition on various critical and dispositive points.

4. On the Court's initiative and over a showing by Plaintiffs in *Adams* that consolidation presented significant risk of confusion and denial of due process, the two cases were consolidated pursuant to Federal Rule of Civil Procedure 42(a).

5. Shortly thereafter, pursuant to *Applications* filed in each case, the judge to whom the cases were first assigned referred the consolidated cases to the Chief Judge of the

Circuit for nomination of a district court of three judges under 28 U.S.C. § 2284 and this Three-judge District Court was duly empaneled by order filed November 16, 1998.

6. Plaintiffs in *Adams* filed a *Motion for Summary Judgment* and Defendants in *Adams* filed three *Motions to Dismiss*.

7. Plaintiffs in *Alexander* filed a *Motion for Summary Judgment* and Defendants in *Alexander* filed *Motions to Dismiss*.

8. These dispositive motions in both cases were heard in oral argument on April 19, 1999.

9. The Three-judge District Court entered judgment on March 20, 2000 on the various dispositive *Motions* filed by the parties (the *Memorandum Opinion* is reported at 90 F.Supp.2d 35-72 (D.D.C. 2000)),[1] dismissing all claims challenging the constitutionality of apportionment of congressional districts in both cases.

10. Although the *Memorandum Opinion* is captioned in a manner and discusses the cases in a manner which indicates the *Memorandum* is intended to address the claims presented in both cases, and although the Court entered judgments disposing of claims in both cases, the *Memorandum* only actually discusses the claims presented in *Alexander*.

11. To the extent the *Memorandum* mentions claims presented in *Adams*, the *Memorandum* either directly and overtly or indirectly and by inference treats the claims in *Adams* as subsumed within the claims in *Alexander*, presenting – at most – points or suggestions in addition to those presented in *Alexander*.

12. With a few technical exceptions (the details which do not alter the dispositive points made by the Court), *Adams* Plaintiffs agree with the Three-judge District Court's analysis of the merits of *Alexander*, but the Court's analysis does not address the claims actually made in *Adams*, nor is this analysis of the claims and arguments in *Alexander* dispositive of those presented in *Adams*.

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[1] The reported *Memorandum* notes it is "as amended April 20, 2000," but it appears that the only amendments were to the opinion of the dissenting judge.

13. If applied to the actual claims and arguments presented in *Adams*, the Court's analysis of the merits of *Alexander* technically begs the question presented at the heart of *Adams*.

14. Since judgment disposing of the claims made in *Adams* was entered on the basis of analysis of antithetical or, at best, irrelevant claims and arguments in a separate, distinct case, Plaintiffs in *Adams* were denied due process of law.

15. Plaintiffs in *Adams* are entitled to reasoned consideration of the claims, arguments, and evidence they placed before the Court, without being subsumed within antithetical claims or arguments presented by any other party in this or any other case.

16. The last time counsel for Plaintiffs was able to review the official Record of this case at the office of the Clerk, the Record was not complete or fully accurate; several documents are mislabeled and the Record does not contain at least one key document: Plaintiffs' *Memorandum* in support of Plaintiffs' *Motion for Summary Judgment* with supporting evidentiary exhibits; counsel has not been able to ascertain the accuracy of the Record at present.

17. A *Memorandum of Points and Authorities* in support of Plaintiffs' request is filed simultaneously with this *Motion*; attached to the *Memorandum* is a comprehensive factual *Analysis of the Memorandum Opinion*.

Therefore, on the basis of the instant *Motion* and argument and evidence in support of the *Motion*, Plaintiffs ask this honorable Three-judge District Court to relieve them of its judgments entered on March 20, 2000 dismissing their claims.

Further, Plaintiffs ask the Court to reconstitute the Record in this case to include all documents and only all documents pertaining to this case, and Plaintiffs ask the Court to set the case for oral argument on Plaintiffs' *Motion for Summary Judgment* and on Defendants' *Motions to Dismiss* (which were before the Court prior to entry of the judgment from which relief is sought) in order to insure that issues in the case are clearly set forth as the parties to this case frame them.

Pursuant to Local Civil Rule 7.1(f), Plaintiffs also lodge a request that the Court set the instant *Motion to Relieve* for oral argument.

Respectfully submitted,

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ANALYSIS OF THE *MEMORANDUM OPINION*
OF THE THREE-JUDGE DISTRICT COURT
ENTERED ON MARCH 20, 2000

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INTRODUCTION

On June 30, 1998, *Lois E. Adams, et al., v. William Jefferson Clinton, et al.,* was filed in the United States District Court for the District of Columbia. Almost four months later, *Clifford Alexander, et al., v. William M. Daley, et al.,* was filed in the same court. These two cases, without having been so planned or coordinated, represent the two categorically different responses to aspects of the situation of residents of the District of Columbia, which have been in tension ever since the District came into existence and its problems were identified. While some people have focused upon "representation" in Congress, others have focused upon full integration into the fabric of American political life, on the same grounds or terms as everyone else in the United States. Thus, while this historic dichotomy came to be manifested in two separate law suits filed within months of each other by pure accident, the dichotomy is among the oldest in District history. But history aside, as a matter of law and the legal process, the claims and arguments in *Adams* are not only different from the claims and arguments in *Alexander*; they are *antithetical* and mutually exclusive at key points.

On the court's initiative, the two cases were consolidated pursuant to Federal Rule of Civil Procedure 42(a), with specific reference to *Synar v. United States*, 626 F.Supp. 1374, 1379 (D.D.C. 1986), *aff'd sub nom Bowsher v. Synar*, 478 U.S. 714 (1986), confirming that consolidation would not "merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another[.]" *Id.*, quoting *Johnson v. Manhattan Railway*, 289 U.S. 479, 496-97 (1933). *See also* 9 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure, Civil 2d* § 2382 at 429-31 (1995). Plaintiffs in *Adams* had opposed consolidation (Oct. 21, 1998) and, when the *Order* consolidating the cases was issued, filed a *Motion to Alter or Amend* the *Order* (Nov. 12, 1998) to suggest minimal adjustments necessary in light of the facts of the case. The *Motion* was denied (Dec. 23, 1998)).

When each case had been filed, Plaintiffs in each also filed an *Application* for referral of their respective cases to a district

court of three judges pursuant to 28 U.S.C. § 2284, which provides that "[a] district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts[.]" A few days after the court consolidated the cases, the court granted these *Applications* (reported at 26 F.Supp.2d 156 (D.D.C. 1998)). The Three-judge District Court entered judgment on March 20, 2000 (as amended April 20, but the only amendments appear to have been to the dissenting opinion). The Three-judge District Court's *Memorandum Opinion* is reported at 90 F.Supp.2d 35-72 (D.D.C. 2000) (cited hereinafter as "MO," using West's pagination from 90 Federal Supplement 2d).

Although the *Memorandum* is captioned in a manner and presents the cases in a manner which indicates the *Memorandum* intends to address claims presented in both cases, and although the Court entered judgment dismissing claims in both cases, the only claims and arguments actually discussed in the *Memorandum* are those presented in *Alexander*. To the extent the *Memorandum* mentions claims presented in *Adams*, the *Memorandum* either directly and overtly or indirectly and by inference treats the claims in *Adams* as submerged within the claims in *Alexander*. *Adams* is treated as presenting – at most – points or suggestions "in addition to" those presented in *Alexander*. In short, the principles of *Synar, supra*, 626 F.Supp. at 1379, notwithstanding, *Adams* was *merged into Alexander*, so the claims made in *Adams* were not examined in their own right.

For all intents and purposes (with a very few technical exceptions, the details which do not alter the larger points made), *Adams* Plaintiffs agree with the analysis of the merits of *Alexander* in the *Memorandum*, but the *Memorandum*'s discussion simply does not address the claims, arguments, or evidence presented in *Adams*. If applied to the claims made in *Adams*, the *Memorandum*'s discussion of the merits of *Alexander* begs the question presented at the heart of *Adams*.

The following analysis demonstrates these points. It analyzes every passage in the *Memorandum Opinion* which

either purports to address a claim or argument presented in *Adams* or which, in retrospect, *might be taken* to address a claim or argument presented in *Adams*.[1] Since the *minimal*, twofold purpose of this analysis is to demonstrate that *every* discussion purporting to address a claim or argument presented in *Adams* is actually a discussion of a claim or argument presented in *Alexander* and to demonstrate that *every* discussion addressing a claim or argument presented in *Alexander* cannot be taken as dispositive of any claim or argument presented in *Adams*, some passages in this analysis may seem repetitive. This apparent repetition is only to serve the larger purposes of the analysis, however, and each passage is actually different from others, since it analyzes a different particular sentence or passage in the *Memorandum*.

THE SUBSTANCE OF THE *MEMORANDUM OPINION*

The Structure of the *Memorandum Opinion*

The Court's *Memorandum Opinion* is divided into six logical sections or "Parts." Parts One and Six (*n.b.*, the Court uses Roman numerals) are an introduction and conclusion to the *Memorandum*, respectively. Part Two of the *Memorandum* is devoted to identification of claims which the Three-judge District Court determined should be remanded to a district court of one judge because these claims were deemed to fall outside the ambit of 28 U.S.C. § 2284. Part Three of the *Memorandum* is devoted to two "threshold" questions – whether any claims present "political questions" and whether plaintiffs in the two cases have standing. This leaves two Parts of the *Memorandum* which are devoted to the actual claims and arguments presented in the two cases.

Part Four is far the longer of the two (comprising over half the entire *Memorandum*) and it is devoted to a claim made

[1] This *Analysis* does not attempt to analyze or discuss in detail other questions or peculiarities about the progress of the case through the courts which are not stated in the *Memorandum Opinion*, such as the fact that an associate with the law firm which represented the individual Plaintiffs in *Alexander v. Daley* is named in the Record in *Adams* as *co-counsel* to *Adams*' Plaintiffs' actual counsel, although this gentlemen never was co-counsel in *Adams*, nor was he involved in any aspect of *Adams*, to any degree, in any way or capacity, ever. It's assumed his name was not added to the Record by the court's computer itself.

only in *Alexander*. Not only is this claim absent from *Adams*, but the claim is based on assumptions or arguments which are antithetical to the claims and arguments presented in *Adams*. To put it in a nutshell, the Three-judge District Court's finding that this claim in *Alexander fails* actually vindicates critical elements of the claims made in *Adams*.

Part Five of the *Memorandum* discusses "other arguments" or claims than the key argument or claim presented in *Alexander*. Of these "other" claims, only two are presented in *Adams*. Thus, out of the entire *Memorandum*, less than nine percent (9%) of the *Memorandum*'s attention is devoted to claims which – merely as captioned – might be taken as those which are presented in *Adams*. In fact, however, the only thing the "claims" discussed in the *Memorandum* share among the two cases are their captions. The actual claims presented in each case are quite different and discussion of each claim as it was made in *Alexander* has no dispositive bearing on the claim as it is made in *Adams*. Again, in short, the claims, arguments, and evidence presented in *Adams* are not analyzed or addressed on their merits.

Part One: an Introduction

The first words of the *Memorandum* are that, "[i]n these consolidated lawsuits, seventy-five residents of the District of Columbia, along with the District of Columbia itself, challenge as unconstitutional the denial of their right to elect representatives to the Congress of the United States. Plaintiffs argue that their exclusion from representation is unjust." MO at 37. While not dispositive of all which follows, these simple statements are a clear signal that something is amiss from the start.

It may be that *Alexander* is accurately summarized as presenting a single, comprehensive claim that "denial of a right to elect representatives" is unconstitutional, but this is not an accurate statement of the *two* claims in *Adams*. The key claim in *Adams* is an equal protection claim: that the Plaintiffs are subjected to unjustifiable discrimination in that they are treated differently than other populations under or

ever under identical powers of Congress. *Adams' Complaint* (June 30, 1998) at ¶¶ 1-87; *Adams' Memorandum in Support of Summary Judgment* (Dec. 22, 1998; hereafter "*Adams'* MSJ") at 31-57; *see also infra* at 25-37. This is buttressed by a claim that the Plaintiffs are entitled to republican forms of government, which are denied to them. *Adams' Complaint* at ¶¶ 1-36 & 88-118; *Adams'* MSJ at 58-76. By framing the questions presented in *Adams* in terms of the central claim in *Alexander*, however, the *Memorandum* minimizes – if it doesn't foreclose – the possibility that *Adams* claims, arguments, and evidence will be addressed on their merits.[2]

Generally, whole categories of relevant illustrative questions, arguments, and ramifications of questions are wholly excluded from the discussion by the way a question is posed. For instance, one implication of *both* claims in *Adams* is that residents of the District should be able to run for the offices of federal or state government, if the District were not held by Congress and its agents in a sort of political limbo or "extraterritorial" status outside the various states. *See Adams' Opposition to Control Board's Motion to Dismiss*[3] (Aug. 4, 1998; hereafter "*Adams' Opposition* to CBMD") at 11 & 33; *Adams' Response to Committee for the Capital City, Amicus Curiae* (Apr. 1, 1999) at 2. This is not a matter of "electing representatives" but of *representing*. A focus on "electing representatives" occludes this implication and the breadth it gives to *Adams'* actual claims.

But more important, perhaps, is the fact that the answer to any question is prefigured in the precise question posed.

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[2] The Defendants in *Adams* apparently anticipated this fact and employed it as a defense tactic. *See Adams' Reply to Clinton's Opposition to Summary Judgment* (Mar. 8, 1999) at 1, 9; *Adams' Reply to House Officers' Opposition to Summary Judgment* (Mar. 8, 1999) at 1, 3, 5.

[3] The "Control Board" is the District of Columbia Financial Responsibility and Management Assistance Authority, a named Defendant in the case. Ultimately, *Adams'* claims against the Control Board were remanded to a single judge because those claims do not concern apportionment of congressional districts, as the Three-judge District Court construed its jurisdiction. As noted elsewhere in this Analysis, while *Adams* Plaintiffs would argue that the Three-judge District Court could and should have retained jurisdiction over these claims, they do not challenge the determination to remand these claims nor address the reasoning which led to it.

Thus, when looking to remedies, *Alexander* demanded that the court guide Congress in *providing* an opportunity for District residents to vote for a member of Congress. But the remedies germane to *Adams* are almost globally different. *Adams*' strict equal protection claim could be obviated or made moot (generally) in either of *two* ways: Congress could *extend* to Plaintiffs the same respect and benefits accorded all identically-situated people *or* Congress could *withdraw* those benefits from all identically-situated populations.[4] *See Heckler v. Mathews*, 465 U.S. 728, 740 & n.8 (1984) (quoting *Iowa-Des Moines Nat. Bank v. Bennett*, 284 U.S. 239, 247 (1931); other citations omitted). *Adams* placed this fact before the Court, *see Adams' Reply to House Officers Challenge to Standing* (Aug. 14, 1998) at 7-9 and *Adams' Opposition to Federal Defendants' Motions to Dismiss* (Nov. 2, 1998; hereafter "*Adams' Opposition* to FDMD") at 46-47, both to rebut Defendants' efforts to distort and confuse the issues as well as to clarify that the actual claim at the heart of *Adams* was strictly for *denial of equal treatment*. The same point was also placed before the Court in an effort to minimize the risk that the cases would be improperly merged. *See Adams' Motion to Alter or Amend Order Consolidating the Cases* (Nov. 12, 1998; hereafter "*Adams Motion to Amend*") at 2. Certainly, if the questions the *Memorandum* addressed made it difficult or impossible to see that *Adams* demanded categorically different remedies from those sought in *Alexander*, then serious questions of due process of law are raised.

We will return to these issues (remedies and claims) in more detail when we discuss the equal protection claims in the cases, *infra* at 25-44. For now, to avoid a long excursion into points which will be repeated again later, and since the Part of the *Memorandum* being discussed is only an

[4] Technically, there is a third way Congress could obviate *Adams*' equal protection claim (though language would be stretched too far to say Congress could "remedy" the claim this way): Congress could use its power to convert the entire present District into a *nonresidential* national park, containing only federal offices, monuments, and military installations. This alternative was noted in the Record. *See Adams' Opposition* to FDMD at 73 n.42; *Adams' Reply to House Officers' Opposition* at 6-7; *Adams' Reply to Control Board's Opposition* at 6-7 n.6.

introduction and since we are only considering introductory framing of the issues, we would note only that this fundamental point as to the complete difference between the two cases was placed before the Court in opposing consolidation. *Adams' Memorandum Showing Cause Why the Cases Should Not be Consolidated* (Oct. 21, 1998; hereafter "*Adams Opposing Consolidation*") at 4-5 (citations omitted); see also id. at 5-12 and *Adams' Motion to Amend* at 2-3 & 5. Later, when the Defendants sought to confuse the claims made in *Adams* for the claims made in *Alexander* (a time-honored defense strategy), the point was raised again that collapsing *Adams*' claims into *Alexander*'s claims threatened due process of law. *See, e.g., Adams' Reply to House Officers' Opposition to Summary Judgment* (Mar. 8, 1999; hereinafter, "*Adams' Reply to House Officers' Opposition*") at 3.[5] Yet, though this was placed squarely in the Record, *Adams* is framed in the Three-Judge Court's *Memorandum* in terms which are germane to *Alexander* and, at best, alien to *Adams*.

In sum, from the opening of the *Memorandum*, the twenty plaintiffs in *Adams* are forced into the same boat as the fifty-five plaintiffs in *Alexander*, condemned to seek the same thing the plaintiffs in *Alexander* seek, even though that goal is antithetical to the goal sought by plaintiffs in *Adams*. This merging of *Adams* into *Alexander* proceeds throughout the *Memorandum* with references to a single "case" before the Court when the merits of the *two* cases are actually on the table, MO at 38, 39, 40, 42, 43, 44, 66, and with reference to "plaintiffs" as an amorphous cohort, MO at 37, 38, 40, 41, 44, 45, 66, 67, 68, 69, bringing the same claims, MO at 38, 39, 41, 45, 65, 66, 68, 70, 71, seeking the same relief or remedies, MO at 37, 45.

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[5] "[The House Officers] suggest that this case turns on the proposition whether 'article I, § 2, cl. 1 must be read to permit District residents to vote in congressional elections[.]' These statements make it clear, again, that the Defendants confuse this case with *Alexander v. Daley*. That being the case, due process of law mandates that this confusion be untangled, so the Plaintiffs' unique claims can be addressed on their own merits, rather than subsumed in alien and even antithetical claims."

Part Two: Claims to be Remanded

Part Two of the *Memorandum* considers the scope of the Three-judge District Court's jurisdiction and distinguishes certain claims which the Court determines it should remand to a normal District Court comprised of a single judge. The *Memorandum* also repeats the statement that the cases both are focused upon "failure to apportion members of the House of Representatives to the District[,]" MO at 38, which phasing reflects the assumptions on which the apportionment claim in *Alexander* is built, such as that the District would remain "the District" and would be apportioned representation as such an entity. But *Adams* is built on the assumption that the residents of the District *cannot* be included in apportionments unless they reside in a State, which means Congress would have to change the status of "the District," as such, *just as* Congress changed the status of the places to which *Adams* Plaintiffs compare themselves. While we're speaking of very "fine line" differences in expression here, the implications are radically divergent.

The claim evaluated to be remanded is described as "both complaints' demands for representation in the Senate[.]" MO at 38-39. In fact, *Adams* makes no such "demand" whatsoever.[6] This issue was brought to the Court's attention in *Adams' Motion to Amend*, where specific language was suggested to obviate the risk of *Adams* being confused with *Alexander*. *See especially* the draft Order submitted with

[6] In the *Complaint*, Adams does refer to representation in the Senate in one place – the section of the *Complaint* dealing with declaratory judgments. *Complaint* at p. 22, ¶ A.2.a. Declaratory judgments, however, are not convertible to demands for injunctions or other affirmative relief amounting to reification of the rights declared, so while Plaintiffs may wish to have a right defined, that definition does not amount to a "demand for representation" itself. Further, while some congressional actions which effect apportionments also have results in the form of representation in the Senate, *see Adams' Application for a Three-judge District Court* (June 30, 1998) at 5, this transpires upon events far beyond the competence of the Courts and *Adams* does not name any Senate officers as defendants precisely because they have no reason to think the courts can or should order any Senate officers to admit Senators from the District (as it might be phrased with reference to the claims in *Alexander*), so *Adams* makes no "demand" for representation in the Senate.

Adams' Motion to Amend.

The second such claim evaluated is "*Adams* plaintiffs' challenges to Congress' continuing exercise of exclusive authority over matters of local concern[.]" MO at 39; *see also id.* at 68 n.63. While *Adams* would argue that the Three-judge Court could and should have retained jurisdiction over these claims, they are accurately identified in the *Memorandum*, insofar as the purposes in the *Memorandum* of distinguishing claims the Court intended to remand.

Part Three: Threshold Questions

The third Part of the *Memorandum* discusses two threshold questions posed by various Defendants in both cases. The first is whether the cases present political questions which the courts cannot resolve. The second is whether plaintiffs in both cases have standing to bring suit. To answer both questions, the *Memorandum* again collapses all individual plaintiffs into a unitary cohort, *see, e.g.*, MO at 40, and analyzes the questions as if a single "case" and a single "dispute" were before the Court, *id.* ("The resolution of this dispute . . . ."), *and* as if that single case is *Alexander* and *is not Adams*.

For instance, in the *Memorandum*'s consideration of the question whether "the case" presents a political question which is textually committed to another branch of the government, *see Baker v. Carr*, 369 U.S. 186, 217 (1962), the *Memorandum* looks to the threshold "allegation" (singular) in "the case" (singular), which the *Memorandum* frames as the proposition "that District residents are among those qualified to vote for congressional representatives under Article I" of the Constitution. MO at 40. This allegation is germane to *Alexander*; it is part and parcel of the claim at the heart of *Alexander*. Conversely, this allegation is not only *alien* to *Adams*; it is antithetical to the claims in *Adams*. While *Adams* contends that exclusion of District residents from apportionments of congressional districts violates their rights, *Adams* does not contend that they are presently "qualified to vote for congressional representatives under Article I," a phrasing and argument unique to *Alexander*.

Adams' Complaint states, among other things but perhaps most pertinently to show that the claim in *Alexander* is alien to *Adams*:

> The District of Columbia, presently, is neither a sovereign State nor a part of a sovereign State.
>
> The entire area of the District of Columbia or the entire area of the District of Columbia other than the area defined in the United States Code and in the District of Columbia Code as the "National Capital Service Area" could, as matters of law and fact, be admitted to the United States as a sovereign State or could be unified with an existing sovereign State.
>
> The Plaintiffs could participate in the Congress of the United States by elected representatives, serving under the terms of Article One and Amendment Fourteen of the Constitution of the United States, if the District of Columbia were a state or a part of a state.
>
> The Congress of the United States, with the assistance and efforts of the Defendants and others, could apportion to the citizens of the District of Columbia, including the Plaintiffs, representation in the Congress of the United States under the terms of Article One and Amendment Fourteen of the Constitution of the United States if the District of Columbia were a sovereign state or a part of a sovereign state.

¶¶ 35, 36, 101, 106 (underlining added). In short, *Adams* declares the obvious as elements of the case: the District *is not* a state or part of a state; the District *could be* a state or part of a state; *if* the District were a state or part of a state, District residents would be represented in Congress. Obviously then, so long as the District is neither a state nor a part of a state, the residents of the District *are not* "qualified" (the word the *Memorandum* uses and which *Alexander* used) to elect representatives to Congress, for the critical "qualification" for such "voting" is to be a citizen of a State. *See Adams'* MSJ at 7-12 (arguing this very point); *see also* discussion under Part IV, *infra*.

Thus, *Adams* is based on assumptions, premises, or contentions radically different from those on which *Alexander* is based, such as this contention taken from *Alexander* and addressed in the *Memorandum* that Congress might pass a statute conferring some form of this "qualification."

> [*Adams* Plaintiffs] state[] plainly that they *do not* seek to elect any representatives to Congress by virtue of legislation or artifice treating the District "as if" it was a state and the Plaintiffs have *never* made any argument based on the straw propositions whether "article I, § 2, cl. 1 must be read to permit District residents to vote in congressional elections[.]"

Adams' Reply to House Officers' Opposition at 3. Insofar as such a concession *has not* been conferred (or imposed) upon *anyone else* under the same powers of Congress as the people of the District, *see infra* at 25-37 (discussion of *Adams'* equal protection claim), this concession of an ersatz qualification to vote would violate the rights to equal treatment which are placed at issue in *Adams*. In short, the *threshold* assumption posited in its *Memorandum* as the foundation or premise to "plaintiffs' claims" to be addressed in the *Memorandum* violates the very rights asserted in *Adams*.

For the purpose of the claims presented in *Adams*, the critical threshold assumption for determination whether the questions presented in *Adams* are political questions textually committed to another branch of Congress, *see Baker, supra*, is merely that District residents are among those entitled to the protections of the Constitution.

> [*Adams*] seeks declarations that [plaintiffs] *have* certain rights, declarations that their rights *are being violated*, and injunctions *to stop the violations* of their rights. This is well-mapped ground, wholly within the jurisdiction and competency of the federal courts, since the most important task of the federal courts is addressing and vindicating the constitutional rights of the citizens.

Adams' Opposition to FDMD at 7-8 (cross reference omitted), citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803).

Adams Plaintiffs meet and cross this threshold. *See* argument in *Adams*' MSJ at 31-34 & 58-68 (all *Baker* elements to test whether a question presented is a "political question" are surveyed in *Adams*' *Opposition* to FDMD at 7-12). All other elements or considerations bearing on the question whether a case presents a political question, *see Baker, supra,* 369 U.S. at 217, are discussed in *Adams*' *Opposition* to the Federal Defendants' *Motions to Dismiss* at 7-12 and the Defendants presented no credible argument to overcome *Adams*' Plaintiffs' showing that *Adams does not* present any political questions for resolution by the courts.

Standing, like the "political question" issue, is examined and decided in light of claims made solely in *Alexander* and, in the course of this examination, the claims and arguments made in *Adams* are more overtly distorted. According to the *Memorandum*, the key assumptions the Court must make to determine "plaintiffs'" (unitary) standing are "that the District is a 'state' for apportionment purposes and that the Constitution is not the cause of [plaintiffs'] electoral disability[,]" MO at 41, *or*, in the alternative, that "plaintiffs [are] Maryland citizens for purposes of congressional voting[,]" *id.* at 45 (citing *Alexander* documents).

As noted above, the former assumption is most certainly *not* an assumption germane to or even compatible with the claims and arguments in *Adams*. *See also* more extensive discussion under Part Four, *infra* at 20-24. The latter assumption is even more alien and antithetical to the claims and arguments in *Adams*. Certainly, no reference to this "remedy" (to treat D.C. as a part of Maryland for a single purpose, howsoever salutary) is to be found in *Adams*' *Complaint*. Further, *Adams* specifically rejected or rebutted aspersions that *Adams* was concerned with such a "remedy."

For instance, Defendant Clinton had made just such an aspersion as is framed in the *Memorandum* as the threshold assumption for assessing standing in Defendant Clinton's memorandum in opposition to Plaintiffs' *Motion for Summary Judgment*. *See* Clinton's *Opposition* (Fed. 10, 1999) at 4-5 n.2. Plaintiffs responded, saying, "Plaintiffs do not ask the Court to

make the District a part of Maryland[.]" *Adams' Reply to Clinton's Opposition to Summary Judgment* (Mar. 8, 1999; "*Adams' Reply to Clinton's Opposition*) at 8-9. Insofar as *Adams* notes the obvious – that District residents would vote for representatives in Congress if the District were ceded to Maryland by Congress or was admitted as a state, *see, e.g., Adams' Complaint* at ¶¶ 36, 101, 106, *Adams* also took great pains to note that the legal remedies sought in this case go only to terminate or end the status quo, without trenching on or invading the prerogative of the people of the District of Columbia to chart their future or the power of Congress to dispose of the District. *See, e.g., Adams' Reply to House Officers' Challenge to Standing* (Aug. 14, 1998) at 9-12; *Adams' Opposition* to FDMD at 2-5, 12-18. The potential futures for the District, in short, are wholly *political*, so the courts cannot "order" them or award them as "remedies," nor should the courts even opine on the desirability of one as opposed to the other.

This limitation was stressed, among other places, in *Adams'* response to an *amicus* brief filed on behalf of the Committee for the Capital City, the leading advocacy group supporting reunification (retrocession) of the District with Maryland:

> [W]hile retrocession of the District of Columbia with Maryland *could* remedy the claims at issue in *Adams v. Clinton*, it *would only* do so if that "solution" were the expressed determination of the citizens of the District *and* of Maryland. Thus, if the Court follows the Committee's advice and "order[s] that the votes of District residents be counted with the Maryland totals for purposes of elections to the U.S. Senate and U.S. House of Representatives," the Court not only would have exceeded its jurisdiction – *i.e.*, by addressing a *political question*: what the political status of the District *should be* or *is* – but the Court would also violate the rights of the citizens of the District to republican forms of government – *i.e.*, by depriving them of a government they have *chosen*.

Adams' Reply to Committee for the Capital City, Amicus Curiae at 3-5 (citation and footnotes omitted), citing *Adams'* MSJ at 68-73; *see also Adams'* MSJ at 1, 76-78. The Committee for the Capital City also proposed a remedy which replicated one of the remedies proposed by Plaintiffs in *Alexander*, saying the Court should apply an "Enclave Solution" to remedy the injuries of the citizens of the District of Columbia, meaning the Court would "order that the votes of District residents be counted with the Maryland totals for purposes of elections to the U.S. Senate and U.S. House of Representatives," even though the District would not be part of the State of Maryland. *See Adams' Response to Committee for the Capital City* at 1-2 (citations omitted). In response, *Adams* Plaintiffs stated that the Committee's "propositions are not accurate statements of the situation of the federal enclaves or the District [and] the Committee's 'solution' would violate the rights of the citizens of the District of Columbia to equal protection of the laws and to republican forms of government." *Id.* This position had previously been stressed as a critical difference between *Adams* and *Alexander*, focusing upon the fact that either expression of *Alexander's* proposed relief (like that later proposed by the Committee for the Capital City) would be a unique, legislated status for the District. *See Adams Opposing Consolidation* at 4-5 (citations omitted). These statements, along with other information in the Record, should have made it explicitly clear by the time of oral argument that *Adams* did not seek any order of the Court which would "permit plaintiffs to vote for representatives as if they were citizens of Maryland." MO at 45.

In sum, when the question is posed in the *Memorandum* "whether the failure of both complaints to include Maryland election officials as defendants poses an insuperable obstacle to redressability, given that one proposed remedy is to permit plaintiffs to vote for representatives as if they were citizens of Maryland[,]" MO at 45, the *Memorandum* necessarily converts the claims made in *Adams into* the claims made in *Alexander*, virtually amending *Adams' Complaint* to include claims antithetical to those made by the Plaintiffs.

This was not the only constructive or virtual amendment of *Adams' Complaint* which consolidation precipitated. Since the *Memorandum* had defined the *remedy* at issue in "the case before the court" as the remedy sought in *Alexander*, which was a court order directing the Secretary of Commerce *to include* the citizens of the District in an apportionment even though the District is neither a State nor a part of a State, *see* MO at 42 ("A judgment against the Secretary [of Commerce] would be enough to cause her to send the correct numbers . . . ."), the *Memorandum*'s analysis of standing focuses upon *Alexander*'s inclusion of the Secretary of Commerce among the defendants. *See, e.g.*, MO at 41-42. And the *Memorandum* then referred to *Adams* with the observation that,

> it is not . . . necessary to constructively amend [*Adams*'] complaint to bring [a] defendant [we might consider necessary] before the court, because the *Alexander* plaintiffs did sue the Secretary, and we have consolidated the two cases. The Secretary is therefore already before us, and his counsel has already raised all of the appropriate arguments on his behalf.

MO at 44-45. This "constructive amendment" follows from the *Memorandum*'s focus on the claims and remedies presented in *Alexander*.

In contrast to *Alexander*, *Adams* named the President in connection with the apportionment issues, *rather than* the Secretary of Commerce, because the President's role in the process of apportionment is dispositive, unlike that of the Secretary of Commerce.[7]

> *Only after* the President reports to Congress do the States have an entitlement to a particular number of Representatives. . . . It is *not until* the President submits the information to Congress *that the target stops moving*, because *only then* are the States entitled by § 2a to a particular number of Representatives. . . . [B]y contrast, the Secretary[of Commerce]'s report to the President has *no direct effect* on reapportionment until

[7] While Defendant Clinton raised questions as to the scope of a President's immunities from suit, these questions do not bar this case. *See Adams' Opposition* to FDMD at 27-37.

the President take affirmative steps to calculate and transmit the apportionment to Congress.

Franklin v. Massachusetts, 505 U.S. 788, 796, 798, 799 (1992) (emphasis added), citing 2 U.S.C. § 2a(b). But unlike the plaintiffs in *Franklin v. Massachusetts*, *see* 505 U.S at 790-91, Plaintiffs in *Adams* do not seek a court order directing federal officials how to structure or include them within apportionments. *Adams* doesn't seek a judgment directing *anyone* to report the population of the District in any specified way which would affect the apportionments of congressional districts. Rather, *Adams* seeks injunctions preventing reporting of apportionments which *include* some people now or ever under Congress' exclusive jurisdiction, U.S. Const., art. I, § 8, cl. 17; art. IV, § 3, and which *do not include* the residents of the District. The injunctive remedies requested in *Adams* are wholly prohibitory or preventive: that the President and House Officers *not* calculate or transmit apportionments, on the grounds that those apportionments presently violate Plaintiffs' rights to equal protection of the laws and to republican forms of government.

As noted elsewhere in this *Analysis*, this claim could be obviated by reporting all similarly-situated people in the same way or degree (either all or none). Further, there are at least two ways in which the residents of the District might be included, the choice between them is a political choice not susceptible to judicial decision. The ultimate situation in which the residents of the District would find themselves *included* in apportionments of congressional districts must result from a *political* process, not an order of a court (just as residents of federal enclaves could find themselves again *excluded* from apportionments as a result of the political process, *see Evans v. Cornman*, 398 U.S. 419, 423-25 (1970) ("federal enclaves are still subject to exclusive federal jurisdiction and Congress could restrict as well as extend the powers of the States within their bounds") and discussion, *infra*, at 40 & 55). So Plaintiffs in *Adams* don't seek an order that *any* Defendant (other than Defendant District of Columbia Financial Responsibility and Management Assistance

Authority, which is not particularly interested in the instant matter) *do anything*. But a court *can* order that the status quo, under which the Plaintiffs are not included, must end. A court can unlock the fence surrounding the people of the District.

But the *Memorandum* again submerged *Adams*' claims under *Alexander*, thinking it necessary to effect a "constructive amendment" of *Adams*' *Complaint* to conform it to the claims and remedies presented in *Alexander*. In essence, the claims and remedies in *Alexander* amounted to defining the political identity or status for the District, which Plaintiffs in *Adams* contend is first and foremost for the citizens of the District to determine. The *Memorandum*'s constructive amendment of *Adams Complaint*, however, forced *Adams* Plaintiffs to become parties to a remedy which violates the claims actually presented in *Adams*, especially the Guarantee Clause claim that District residents are entitled to forms of government *they* choose, not to forms of government imposed upon them by Congress, the courts, or parties in a law suit. Thus, the "constructive amendment" in the *Memorandum* is antipathetic to the claims and arguments presented in *Adams*.

Finally, the *Memorandum* states that, "[b]ecause the individual plaintiffs in *Alexander* and *Adams* . . . have standing to sue, we need not consider whether plaintiff District of Columbia has standing as well." MO at 45 n.12. In support of this statement, the *Memorandum* cites (*inter alia*) *Animal Legal Defense Fund, Inc. v. Glickman*, 154 F.3d 426, 429 (D.C. Cir. 1998) (en banc), and notes that *ALDF* cites *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996), for the proposition that, "[f]or *each claim*, if constitutional and prudential standing can be shown for at least one plaintiff, we need not consider the standing of the other plaintiffs to raise *that claim*." (emphasis added here). Both statements demonstrate that the cases were not merely consolidated but *merged*. The parties in *each* case became parties in the other, in violation of the strictures of *Synar v. United States*, 626 F.Supp. 1374 (D.D.C. 1986), *aff'd sub nom Bowsher v. Synar*, 478 U.S. 714 (1986), which states that consolidation does not "merge the suits into a single cause, or

change the rights of the parties, *or make those who are parties in one suit parties in another*[.]" *Id.* at 1379 (emphasis added), quoting *Johnson v. Manhattan Railway*, 289 U.S. 479, 496-97 (1933). *See also* 9 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure, Civil 2d* § 2382 at 429-31 (1995). As a threshold matter, Plaintiffs in *Adams* make no claim which could also be brought by the party plaintiff "District of Columbia" which appeared in *Alexander*.

This is not simply a formalistic quibble. The party *Plaintiff* "District of Columbia" in *Alexander* is the municipal corporation created by Congress, *see Alexander*'s *First Amended Complaint* (Oct. 20, 1998) at ¶ 60), by legislation pursuant to the District Clause, U.S. Const., Art. I, § 8, cl. 17. This entity was created under the same power as the *Defendant* District of Columbia Financial Responsibility and Management Assistance Authority ("Control Board") in *Adams*. *See Adams' Complaint* at ¶¶ 12 & 25.

> The position of the municipal corporation of the District of Columbia is *constitutionally indistinguishable* from the position of the District of Columbia Financial Responsibility and Management Assistance Authority ("[Control Board]"), which is a Defendant in [*Adams*]. Therefore, the views of the counsel of the municipal corporation of the District of Columbia [on the question of what sort of government the District should have] cannot to be taken as definitive or as more dispositive than the views of the counsel to the [Control Board]. . . . [Thus],Corporation Counsel has no role to support, oppose, or comment upon the merits of the claims made in [*Adams*].

Adams' Motion to Amend at 3-4 (footnotes omitted); *see also* Defendant *Clinton's Motion to Dismiss* at 19 n.11 and *Adams Opposition* to FDMD at 67 n.38. Thus, the party plaintiff District of Columbia in *Alexander* cannot share in or propound *Adams'* claims against the party defendant Control Board in *Adams*; to challenge the Control Board with the arguments propounded in *Adams*, the municipal corporation District of Columbia would undermine its own authority and existence.

The risk that presence of parties in *Alexander* could confuse the claims and arguments presented in *Adams* had been placed before the Court as a reason to not consolidate the cases. *Adams Opposing Consolidation* at 12-14. While the forced union generated only negligible actual tension in proceedings before the Court, *see, e.g., Motion for Leave to Continue Representation by Corporation Counsel* (Nov. 13, 1998) at 15 & 23ff (where counsel for Plaintiff District of Columbia in *Alexander* argued to the Court that "only the Corporation Counsel can speak in this case on behalf of the District of Columbia as a whole" or "to speak to the interests of the community in this suit[.]"); *see also Adams' Statement in Response* to this motion (Nov. 25, 1998), the substance and pattern of the Three-judge District Court's analysis indicate that the forced union contributed to the occlusion of *Adams'* unique claims and arguments which ran counter to or even apart from *Alexander's*.

To test for standing of Plaintiffs in *Adams*, the *Memorandum* need only address the standard elements outlined in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992). *See also Flast v. Cohen*, 392 U.S. 83, 99-100 (1968), and *Baker, supra*, 369 U.S. at 204. *Adams'* Plaintiffs demonstrated that, as to each Defendant, they have standing to bring the claims they actually bring. *See Adams' Opposition* to CBMD at 3-38; *Adams' Reply to House Officers' Challenge to Standing* at 1-12; *Adams' Opposition* to FDMD at 2-5. Defendants presented no pertinent, credible argument to overcome *Adams'* Plaintiffs' showing that *Adams'* Plaintiffs have standing to bring the claims they actually bring.[8]

Part Four: The Central Claim in *Alexander*

Part Four of the *Memorandum* (by far the lion's share – fifty-four percent of the whole), by the description in the *Memorandum*, addresses only the central claim presented by Plaintiffs in *Alexander*: "that their right to vote in congressional

[8] Rather, as noted above, Defendants argued the standing issue by misrepresenting the claims made in *Adams* as being the claims made in *Alexander*. Thus, Defendants never actually argued the standing question on the merits of *Adams*, as distinct from *Alexander*.

elections is guaranteed by Article I of the Constitution." MO at 45. It nevertheless appears that the *Memorandum* attributes this claim as well to *Adams*. While this itself is erroneous, for *Adams* did not make this claim and this claim is alien and antithetical to the claims and arguments presented in *Adams*, the *Memorandum*'s short reference to *Adams* in this Part raises puzzling questions.

The *Memorandum* construes *Alexander*'s Article I claim to rest on the proposition "that to succeed they must be able to characterize themselves as citizens of a 'state.'" MO at 46. The *Memorandum* finds this threshold proposition in *Alexander* Plaintiffs' *Opposition* to *Alexander* Defendants' *Motions to Dismiss* at p.15, but the *Memorandum* also cites *Adams' Opposition to Federal Defendants' Motions to Dismiss* at p.51 for the same proposition. The only reference to "States" or to the status of the residents of the District on page 51 of *Adams' Opposition to Federal Defendants' Motions to Dismiss* (the point cited by the *Memorandum* as bespeaking the same foundation for *Adams*' claims as that lying at the center of *Alexander*) is at the end of a paragraph which starts on page 50:

> Defendant Clinton advances a series of assertions purporting to support the proposition that "the Plaintiffs do not have a Fifth Amendment right to be represented in Congress because the District of Columbia is not a 'State' under the provisions of the Constitution governing representation" (CM at 12-19) (for the purposes of this case, these provisions are Article I, § 2, of the Constitution, as amended by the Fourteenth Amendment, *see* CM at 14).[Footnote 29] The Plaintiffs state this point as an element of their case in the Complaint (Complaint, ¶ 35). The Plaintiffs also agree [page break] (at least for the purposes of the instant argument) that only citizens of "States" are properly apportioned representation in Congress under the Constitution. But, so what? The District's status and the (presumed) legal principle defining representation in Congress do not support the proposition that there are

> *no rights* to representation. The Defendant's conclusory proposition merely begs the question *why* the citizens living under the present status are denied representation.

Adams' Opposition to FDMD at 50-51. The plain meaning of the sentences in this paragraph (which the *Memorandum* apparently cites) is that the District *is not* a "State" and *Adams* acknowledges that *only* citizens of "States" are *properly* apportioned representation. Taken at face value, this paragraph does not replicate or support the proposition that, though the District is not an actual State and is not an actual part of an admitted State, District residents might nevertheless "characterize themselves as citizens of a 'state.'" MO at 46. Taken at face value, the paragraph *refutes* the proposition.

Further, in the middle of the paragraph is a footnote – number 29, the text of which falls on page 50 – which makes it clear the *Adams* does not support *Alexander's* ersatz "state" status. The footnote states:

> Defendant Clinton conducts the argument that the District of Columbia is "unique" with phrases indicating the Defendant either misunderstands or misconstrues the claims at issue in this case. For instance, the Defendant says the District "is not *considered* to be a 'State'" and refers to "the suggestion that the District can be *considered* a State" (CM at 13 & 17; emphasis added). The Plaintiffs understand the Defendant to imply the Plaintiffs simply want to *call* the District a State or *treat it as* a State, even though it's *not* a State. In fact, the Plaintiffs do not seek treatment or "consideration" of the District of Columbia *as* a State. Rather, the Plaintiffs *protest against* being treated any differently than any citizens of the United States are treated (*see, e.g.*, Complaint, ¶¶ 60-61, 65-68). The Plaintiffs do not want the "benefits" of a borrowed status, for benefits on loan can always be withdrawn. They want the benefits of a status to which they are entitled under the Constitution and which Congress has respected for others.

Adams' Opposition to FDMD at 50 n.29 (underlining added). Though not using the specific terms used in the *Memorandum* (approximately a year and a half later), it seems impossible to imagine a more direct and complete rebuttal of the *Memorandum*'s suggestion that *Adams* depends on an ability to "characterize" District residents "as citizens of a 'state.'" In short, *Adams* does not characterize or consider Plaintiffs or any District residents to be citizens of a State.

One possible explanation for this brief but telling misconstruction of *Adams* is that the Court succumbed to *Adams*' Defendants' defense strategy, which was to confuse *Adams* with *Alexander*. By submerging *Adams*' claims under *Alexander*'s claims, the Defendants avoided having to produce evidence they do not have to explain or justify the discriminatory treatment of the District, as compared to all similarly-situated places.

The remainder of Part Four of the *Memorandum* has little if anything to do with the claims, arguments, or evidence presented in *Adams*. For the most part, with only a few minor reservations and one major reservation, *Adams*' Plaintiffs *agree* with the Court's disposition of *Alexander*'s "Article I" claim.[9] The major reservation is with the analysis of the case *Evans v. Comman* on pages 62-65 of the *Memorandum*. This

[9] The minor reservations concern references to history or historic materials. For instance, in footnote 25 of the *Memorandum*, MO at 50, the Court says, "There is general agreement that the District Clause was adopted in response to an incident in Philadelphia in 1783, in which a crowd of disbanded Revolutionary War soldiers, angry at not having been paid, gathered to protest in front of the building in which the Continental Congress was meeting under the Articles of Confederation." The leading support cited for this statement is Kenneth R. Bowling, *The Creation of Washington, D.C.* 30-34 (1991) (this is the same Kenneth R. Bowling, by the way, who submitted two original *Affidavits* in support of the claims and arguments presented in *Adams*). *Adams* Plaintiffs would note that Dr. Bowling's book is devoted, in large part, to demonstrating that this event *was not* the source or root of the District Clause and *was not* even directed at Congress. In short, as it has been handed down to us, it is a myth. This doesn't mean there were no good reasons to have something like the District Clause in the Constitution, for there were and probably are today. At the least, it tempers our analysis and moderates our reverence for the Founders to learn that they were as ready and adept as modern politicians are to use the media and a good "photo-op" for their pet political purposes.

case is cited in support of *Adams*' equal protection claim, so the *Memorandum*'s analysis of *Evans* will be discussed in connection with *Adams*' equal protection claim, *infra*, under discussion of Part Five of the *Memorandum*. For now, it would be noted that, for the purposes of the present analysis of *Evans* and the *Memorandum*'s treatment of it, the *Memorandum*'s treatment would not be so clearly problematic if *only Alexander* had been before the Court, for *Alexander* did not present argument or – more importantly – *evidence* concerning the historic treatment of the federal enclaves, with which *Evans* is concerned. If the *Memorandum*'s treatment of *Evans* is applied only to *Alexander*'s claims, the *Memorandum*'s treatment remains tenable (though somewhat precariously). These reservations, however, do not shift or contradict the *Memorandum*'s legal conclusions or points as they concern the claim presented in *Alexander*.

Part Five: "Other Arguments"

Part V of the *Memorandum* deals with "plaintiffs' arguments based on provisions of the Constitution other than Article I." MO at 65. This frame for the issues, following the pattern set earlier in the *Memorandum*, collapses the claims made by *Adams*' Plaintiffs into mere "arguments" supporting the singular claim made in *Alexander* (that the residents of the District have a fundamental right to representation in Congress, supported by a variety of different arguments).[10] Although all the claims or arguments discussed throughout this Part of the *Memorandum* are attributed to generic "plaintiffs," MO at 65-71 and at notes 65 & 66, only two of these "arguments" are *claims* presented in *Adams*. Subpart A of Part V discusses an equal protection "argument," and *Adams*

[10] In their *Jurisdictional Statement* to the Supreme Court, *Alexander* Plaintiffs frame their case on appeal as: "Is Article I, § 2 of the Constitution properly construed to divest U.S. citizens resident in the nation's capital of voting representation in the House of Representatives, and can such as interpretation be harmonized with subsequent amendments to the Constitution and this Court's decisions establishing the right to vote as the central attribute of national citizenship?"

makes an equal protection claim. Subpart D of Part V discusses a Guarantee Clause (U.S. Const., Art IV, § 4) "argument," and *Adams* makes a Guarantee Clause claim. Thus, these particular discussions need be analyzed in some detail.

Subpart A: the Equal Protection Claims

Generally, of course, two different equal protection claims cannot be resolved according to a single analysis *just because* they are equal protection claims. An equal protection claim that an elderly employee was passed over for promotion in preference to a less-qualified but younger employee is completely different from an equal protection claim that a predominantly Latino population composing one congressional district is disproportionately represented as compared to a predominantly white population half its size composing another congressional district. These claims might share a few generic elements, but the analysis of either claim could not, necessarily dispose of the other. While the equal protection claims in *Adams* and *Alexander* may be more closely related than these hypotheticals, the claims are nevertheless discrete and *adverse*. Analysis of the claim presented in *Alexander* has little or no bearing on the equal protection claim presented in *Adams* and conclusion reached in the *Memorandum* with regard to the claim presented in *Alexander* (howsoever tenable in light of the facts *Alexander* put before the Court) *begs the question* presented in *Adams*.

The Equal Protection Claim Presented in *Adams*

The equal protection claim in *Adams* is the heart of the case. Certainly, it's the linchpin to *Adams'* argument that the case was properly before a district court of three judges pursuant to 28 U.S.C. § 2284(a). Therefore, a good place to find a synopsis of the claim is in *Adams' Application for a Three-judge District Court* (June 30, 1998):

> Procedurally, the House of Representatives has the primary responsibility to "allocate" or "apportion" seats in the United States House of Representatives to the

country, creating the various congressional districts. To accomplish this, Congress has charged the President with the responsibility of "transmit[ting] to Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under [each] decennial census of the population, and the number of Representatives to which each State [is] entitled . . . , no State to receive less than one Member." The number reported by the President are then used to calculate how many Representatives will be apportioned to each state.

But Congress's charge to the President and the enumerations reported back to Congress both assume certain preexisting, defined places in which people are to be counted: the States. If (as is asserted in the instant case) Congress uses its powers to isolate a certain district and withhold it from inclusion among the States, that district would not be counted, the citizens there would be excluded from the count and excluded from apportionment ....

. . .

In Count One of the Complaint, the Plaintiffs assert that their rights to the equal protection of the laws are violated because Congress has treated other areas in the United States (over which Congress holds or has held identical, plenary power to the plenary power it still holds over the District of Columbia) differently than it has treated the District of Columbia (for no good reason whatsoever, much less for any compelling reason), trenching upon the Plaintiffs' fundamental rights and privileges to the equal protection of the laws.

Specifically as concerns apportionment, Congress has apportioned representation to the other areas to which the District of Columbia might be compared most closely. Thus, not only has Congress "denied access to the political process equal to the access of other groups" represented in Congress, but Congress has passed "laws 'distributing the franchise'–*i.e.*, granting

'the right to vote to some bone fide residents of requisite age and citizenship' but [has] den[ied] it to [the District of Columbia, and such action is] presumptively invalid."

Adams' Application for Three-judge Court at 6-7 & 10. This argument (with other provisions and citations) was then summarized in the following, prosaic illustration:

> The situation of the District of Columbia might be succinctly analogized to the following hypothetical situation.
>
> Assume an elementary school where all the students in all the grades are to be apportioned to baseball teams for a tournament. Of course, all the teams should have an equal number of members and equal strengths.
>
> But there's one problem. The Principal has locked the students in Mrs. Bethune's sixth grade class in their classroom. All the other sixth-grade classes are apportioned to teams, along with all the students in the first, second, third, fourth, and fifth grades.
>
> [U]ntil a few years go, [however,] the Principal had locked *all* the sixth grade students into their classrooms. But the students had successfully pointed out to the Principal that this was a violation of school rules and seriously unfair, so the Principal had unlocked their doors to include them in teams – unlocked all the doors, that is, except for Mrs. Bethune's door.
>
> There's no reason for Mrs. Bethune's class to be locked out of the games. They are no different than any of the other students in the sixth grade, or in the entire school, for that matter.
>
> Certainly, there are a lot of other problems with what the Principal is doing to Mrs. Bethune's class. The Principal is hurting them in many ways. But *one* very clear way in which they're injured is by exclusion from being counted for – apportioned to – baseball teams.

Application at 13-14. Mrs. Bethune's class (the District of Columbia) is being treated differently than other sixth grade classes (places over which Congress holds or has held the

power of "exclusive legislation"), and that raises an equal protection problem. Unless the Principal (Congress) can legitimate the discriminatory treatment of Mrs. Bethune's class as compared with other sixth-grade classes by a factual showing, segregation he Mrs. Bethune's class violates the Constitution.

Adams' equal protection claim follows a standard format for equal protection voting rights cases, *see, e.g., Dunn v. Blumstein*, 405 U.S. 330, 336 (1972), and *Reynolds v. Sims*, 377 U.S. 533, 565 (1954), in that the Plaintiffs in *Adams* compare themselves, as residents of the District of Columbia, to certain discrete populations who are similarly or identically situated as subjects of specific powers of government, identical to the powers Congress holds over the District.

> [T]he citizens of the District of Columbia must be treated by Congress (and the Defendants as agents and instrumentalities executing the will of Congress) in a manner substantially equivalent to the way Congress treats all other citizens of the United States who are or were subject to powers granted Congress by Article I, Section 8, Paragraph 17 of the Constitution, or to powers which are *identical* to Paragraph 17 powers, unless the discriminatory treatment is a necessary, minimal measure to effectuate a compelling governmental purpose. *Reynolds, supra*, 377 U.S. at 565 ("[T]he concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged."). Therefore, we first identify other groups who are "similarly situated," *D.C. Federation of Civil Assn's v. Volpe*, 434 F.2d 436, 439 (D.C. Cir. 1970), to the citizens of the District of Columbia under the plenary power of Congress over a *place*, for they shall not "be denied the same protection of the laws which is enjoyed by other persons or other classes" in the same jurisdiction, under "like circumstances." [*State of*] *Missouri* [*v. Lewis*], 101 U.S. [22,] 31 [(1879)].

Adams' MSJ at 35 (emphasis in original). The first discrete population to which *Adams* Plaintiffs compare themselves is that of "Alexandria County" (as it was named in 1801 in the "Organic Act," Act of Feb. 27, 1801, 2 Stat. 103, ch. 15 (1801), *reprinted in* 1 D.C. Code at 46-48 (1991 repl.)), also referred to as the former portion of the District south-west of the Potomac River. *See Adams*' MSJ at 36-37. The second discrete population to which *Adams* Plaintiffs compare themselves is that of the federal enclaves. *Adams*' MSJ at 37-47. The third discrete population to which *Adams* Plaintiffs compare themselves is that of the *continental* territories. *Adams*' MSJ at 47-51. These populations are discussed in this order not just for convenience, but because *Adams* deems this to be their order of demonstrative, heuristic, *legal* importance.

For each population, *Adams* shows that, as a matter of law and history, the population has been or is today under precisely the same kind, degree, and source of power as that to which the Plaintiffs are subject, *Adams*' MSJ at 36, 38-39 (discussing Article I, § 8, cl. 17), or under a comparable kind and degree of power, albeit from a different constitutional source, *id.*, at 48-49 & 51 (discussing Article IV, § 3). For each population, *Adams* shows that the effect and result of that exercise of power by Congress was to completely sever or isolate the places so governed from the States, making these discrete places "extraterritorial" to the States, *Adams*' MSJ at 36, 39-40, 49, with the result that the residents of these places were not citizens of States, so they were *not included in apportionments* of congressional districts under the plain terms of the Constitution, *id.* at 36, 40-45, 49, 51. *Adams* also shows that Congress changed its treatment of all comparable areas with the result that all residents of these areas are *now included in apportionments* of congressional districts. *Adams*' MSJ at 37, 44-47, 49-50.

For instance, with regard to the federal enclaves, *Adams* shows:

> When the President conveys the definitive calculations of apportionments to Congress pursuant to 2 U.S.C. § 2a(a), *Franklin v. Massachusetts*, 505 U.S. 788, 791-93,

796 (1992), reporting how many Representative shall be apportioned to the citizens of each state, *see* H.R. Doc. No. 102-18, 102d Cong., 1st. Sess. (Jan. 7, 1991), the President's report *includes* every resident of every federal enclave who is otherwise entitled to vote. When the Clerk of the House certifies the results of the President's report to the Governors of the States pursuant to 2 U.S.C. § 2a(b), the Clerk's certifications reflect apportionments based on a State population which *includes* the residents of all federal enclaves within the State. When the State holds its elections for those Representatives, the residents of the federal enclaves within the State (who are registered to vote in that State) cast *their* votes for *their* Representative, who will be accountable to *them* in *their* Congressional district.

Adams' MSJ at 46 (footnote omitted). With regard to the former "Alexandria County," *Adams* showed that it isn't just "included" in apportionments; by population, it's most of Virginia's Eighth Congressional District. *Adams'* MSJ at 37.

Congress has even been so careful as to *insure* in specific and unambiguous terms that the people who reside in federal enclaves, which formerly would have been *excluded* from apportionments because of Congress' power of "exclusive legislation," would be *included* in apportionments, *id.* at 49-51. When Congress admitted Alaska (a former continental territory) as a State, Congress reserved "exclusive jurisdiction" over all federal enclaves "to the United States, which shall have the sole legislative, judicial, and executive power within such [enclaves], except as provided hereinafter." Pub. L. No. 85-508 §10(c), 72 Stat. 339, 345 (1958); *see also id.* at § 11(b), 72 Stat. at 347. But this reservation was followed by the declaration that:

> reservation of authority in the United States for the exercise by the congress of the United States of the power of exclusive legislation over the [federal enclaves] shall not operate to prevent such lands from being a part of the State of Alaska, or to prevent the said

> State from exercising over or upon such lands, concurrently with the United States, any jurisdiction whatsoever which it would have in the absence of such reservation of authority and which is consistent with the laws hereinafter enacted . . .

Id. at § 11(b)(ii), 72 Stat. at 347. Thus, Congress' "exclusive jurisdiction" over the federal enclaves within the outer boundaries of Alaska after it was admitted as a State would not "prohibit the State of Alaska from enacting and enforcing [within the enclaves] all laws necessary to establish voting districts, and the qualification and procedures for voting in all elections." *Id.*, at § 10(c), 72 Stat. at 346; *see also id.* at § 10(e), 72 Stat. at 347. Thus, *as residents of the State* of Alaska, all residents of these federal enclaves are included in apportionments of congressional districts for Alaska, in Congress.

Adams shows that, as compared to these three, discrete populations, the Plaintiffs and other residents of the District of Columbia suffer loss or infringement of a variety of fundamental rights (referred to collectively for convenience as the "rights, privileges, and immunities of State citizenship"). *Adams*' MSJ at 52-54. Finally, *Adams* shows that there is no reason whatsoever – much less a narrowly tailored compelling governmental reason – for Congress to continue to wield its powers over the Plaintiffs in such a way as to segregate them from their peers who live in places ever or *still* potentially under identical powers. *Adams*' MSJ at 54-56. These showings were also discussed at the Motions Hearing, Transcript at 27-31, and elsewhere in the Record.

And all these showings are supported with reference to evidence of historical events or patterns of which the Court can take judicial notice (such as statutes and judicial opinions cited in *Adams*' MSJ on pages noted above), with reference to Affidavits proving present facts, *Adams*' MSJ Exhibits A-U and Exhibits tabbed W & X attached to *Adams Reply to Clinton's Opposition to Summary Judgment* (Mar. 8, 1999), with reference to official reports produced by or under the supervision or chairmanship of officials or divisions of the

United States Department of Justice showing historic events, *Adams* MSJ Exhibit V and Exhibit Y to *Adams' Reply*, and with reference to maps produced by the United States government showing historic and present facts, introduced at the Motions Hearing (April 19, 1999).

In response, Defendants in *Adams* did not present one page of evidence of any kind showing that there is *any* – much less a *compelling* and *narrowly tailored* – governmental interest in treating the residents of the District differently than Congress has treated all similarly-situated populations. Defendant "Control Board" (though not a Defendant with an interest in the apportionment issues addressed by the Three-judge District Court) submitted various documents attached to its *Opposition* to *Adams'* motion for summary judgment (Feb. 5, 1999) which have the cumulative effect of proving the fact and some of the mechanisms of Congress' differential treatment. Defendants House Officers submitted the Rules of the House, which simply define the roles which make them proper defendants in the case for carrying out Congress's policies. Defendant Clinton submitted no evidence.

The equal protection issue arises in *Alexander* in a different fashion, to quite different effect. The issue arises as a component of *Alexander*'s argument that "District citizens have a Constitutional right to vote in congressional elections." *Alexander*'s *Memorandum in Support of Summary Judgment* ("*Alexander*'s MSJ") at 22. In support of this encompassing claim (and following a two page synopsis of various voting rights cases), *Alexander* Plaintiffs said,

> Their consent to their government is just as important as the consent of other Americans. They are subject to the same burdens of citizenship as their peers in the fifty states. And they have an even greater stake in congressional elections than other Americans have. . .
>
> The disenfranchisement of District citizens in Congressional elections denies these citizens equal protection of the laws because it renders them fundamentally unequal to their peers in the fifty states. . . .

> In addition to rendering District citizens constitutionally unequal to the residents of the fifty states, their disenfranchisement also renders them unequal to millions of Americans who reside on federal enclaves. . . . Despite the common constitutional origins of the District and other federal enclaves, residents of the latter enclaves, but not District residents, are permitted to vote in elections in their former states.
>
> . . .
>
> District residents have an equally vital stake in elections to Congress, which governs them both as a national and state legislature. Equal protection therefore requires that District citizens, too, be permitted to vote in Congressional elections. Any other result would deny these citizens constitutional equality with their peers in the states and with millions of Americans residing on federal enclaves.

Alexander's MSJ at 25-27 (paragraph discussing *Evans v. Cornman* omitted). Insofar as *Adams* was made aware, no affidavits or other evidence of historical events (other than legal-analytic narratives written by unidentified authors) was submitted in support of this equal protection argument.

The essential nature of the two cases can be juxtaposed, to illustrate concisely the differences between the cases and, especially, between their equal protection claims. *Alexander* was premised, in a general sense, on the theory that Congress holds *so much* power under the District Clause of the Constitution, art. I, § 8, cl. 17, that Congress – or the courts – can use that power to amend the strict terms of Article I of the Constitution to either define the District as a pseudo "State" or to define it as a part of Maryland "for the purposes of representation." In contrast, *Adams* is premised on the theory that although Congress holds plenary power under the District Clause, that power *is not unlimited* and is subject always to all other provisions and limits of the Constitution, *see Adams*' MSJ

at 24-26,[11] and among the limits on Congress' magnificent powers are the equal protection provisions of the Constitution, *see Adams'* MSJ at 31-34.[12]

In other words, stripped to barest possible bones, *Alexander* assumes the District Clause trumps the definitions of representation in Article I, while *Adams* assumes that equal protection rights in the Constitution can trump exercises of power under the District Clause. Taking Count One of *Adams' Complaint* – stating an "equal protection" claim, *Adams* contends that the Constitution's guarantees of equal protection of the laws (also expressed as guarantees of equal treatment or equal standing under the law) mean Congress *cannot* do for or to the citizens of the District *what it has not done* for or to any other citizens under identical powers, absent a compelling and unavoidable governmental rationale. Conversely, *Alexander*'s equal protection argument is that the scope of power granted Congress under the District Clause empowers Congress – and the equal protection principles of the Constitution obligate Congress – to devise a legislative vehicle or method under which District residents could vote for some degree or kind of representation in Congress at the same time as the citizens of the "various States" vote under the plain terms of Article I of the Constitution.

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[11] Citing, *inter alia*, *Palmore v. United States*, 411 U.S. 389, 397-98 (1973); *National Mutual Ins. Co. of Dist. Col. v. Tidewater Transfer Co.*, 337 U.S. 582, 602 (1949); *O'Donoghue v. United States*, 289 U.S. 516, 539 (1933); *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 434-35 (1932); *Keller v. Potomac Electric Power Co.*, 261 U.S. 428, 443 (1923); *Binns v. United States*, 194 U.S. 486, 491 (1904); *Downes v. Bidwell*, 182 U.S. 244, 271 (1901); *Capital Traction Co. v. Hoff*, 174 U.S. 1, 5 (1899); *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317, 325 (1820); *United States v. Cohen*, 733 F.2d 128, 149 (D.C. Cir. 1984) (Mikva, J., concurring); *United States v. Thompson*, 452 F.2d 1333, 1338 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 998 (1972); *Sims v. Rives*, 84 F.2d 871, 877-78 (D.C. Cir.), *cert. denied*, 298 U.S. 682 (1936); *Curry v. District of Columbia*, 14 App. D.C. 423, 439-40 (1899).

[12] Citing, *inter alia*, *Shapiro v. Thompson*, 394 U.S. 618, 641-42 (1969); *Schneider v. Rusk*, 377 U.S. 163, 168 (1964); *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Downes*, *supra*, 182 U.S. at 260-61; *Cohen*, *supra*, 733 F.2d at 141, 144-45 (Mikva concurring); *Hamilton National Bank v. District of Columbia*, 176 F.2d 624, 629-30, 85 U.S. App. D.C. 109, 115, *cert. denied*, 338 U.S. 891 (1949); *Hobson v. Hansen*, 269 F.Supp. 401, 493 (D.D.C. 1967), *aff'd sub nom Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969).

As for the "right to vote" asserted in *Alexander*, *see, e.g.*, *Alexander*'s MSJ at 22, Plaintiffs in *Adams* would agree that there is such a thing as a fundamental right to vote, but they disagree that it might be asserted or enforced directly, without regard for or in abrogation of the procedural constraints on exercising that right which suffice for all citizens at the time. Thus, quite simply, the fundamental right to vote cannot be asserted to empower someone who is not a citizen of a particular state to vote for the governor of that particular state, nor can it be asserted to empower someone who is not a citizen of a particular state to vote for a Representative in the United States House, all because of the constitutional structures within which we live as a federation of republics. But, as is asserted in *Adams*, once any government allows one segment of the population under its powers to vote, it must allow all similarly-situated people under the same powers to vote, absent a compelling and unavoidable governmental reason to deny them that opportunity. Insofar as Congress has altered its exercise of power over millions of people with the specific result that *those* people have been placed in the status of being citizens of the states, then Congress must either extend the same benefits to the citizens of the District or withdraw them from all similarly-situated people. Thus, the right to vote is vindicated *through* enforcement of other, well-recognized rights in the Constitution.

From these comparisons, it's clear how the *remedy* sought in *Alexander* would be a direct violation of the right asserted in *Adams*. If Congress used its powers to define the District in a way or to an end completely differently than Congress has treated every other place over which Congress holds or has held *identical* powers, then Congress would violate the right asserted at the heart of *Adams* (howsoever politically desirable the result would be to any segment of the population of the District). This point was brought to the Court's attention in opposing consolidation of the cases,[13] in an effort to show that consolidation of these cases presented

[13] It should be noted that, at this point in the cases, *Adams* had no information about the precise nature of the relief sought in *Alexander* other than what was apparent from *Alexander*'s *Complaint*.

a serious risk of conflict and confusion.

> The claims presented in [*Adams*] would survive the full scope of relief envisioned in *Alexander* because the relief envisioned in *Alexander* – a unique, legislated status for the citizens of the District of Columbia – would itself be an instance of the violations of right to the equal protection of the laws asserted in Count One of the Complaint in [*Adams*]. Likewise, howsoever politically welcome a degree of representation in Congress would be, the remedy anticipated in *Alexander* would deprive the citizens of the District of Columbia of truly republican forms of government. . . . [In part t]his is because the remedy anticipated in *Alexander* is a legislative device, and the citizens are entitled to exercise the indefeasible privileges and immunities of citizenship under the terms of the Constitution, which Congress cannot alter or retract as it sees fit in the moment.
>
> . . . The Plaintiffs in [*Adams*] do not seek any special status by means of Congressional legislation which applies uniquely to the District of Columbia. Quite to the contrary, the Plaintiffs in [*Adams*] protest *against* the special status Congress has maintained for the District, depriving them of the Equal Protection of the Laws and depriving them of republican forms of government. Thus, the relief sought in *Alexander*, while politically expedient, would provide legal grounds for further prosecution of the claims in [*Adams*].
>
> These distinctions go to the reasons these cases are before the Court: to obtain remedies for the injuries charged. If the remedy in one case would be grounds for further litigation in the other, it can hardly be said that consolidation would serve the interests of judicial economy or efficiency. Rather, consolidation presents serious risks of confusion and prejudice, tantamount to denying the parties a reasonable chance to prosecute their respective, distinct claims. Consolidation would trump the Court's interest in "individual justice."

Adams' Memorandum Showing Cause Why the Cases Should Not be Consolidated (Oct. 21, 1998; hereafter "*Adams Opposing Consolidation*") at 4-5 (citations omitted); see also id. at 5-12 and *Adams' Motion to Amend* at 2-3 & 5. Moreover, insofar as the legislative vehicle or device demanded in *Alexander* would be forever subject to revision or repeal by Congress, while the avenue along which all other people similarly situated to the residents of the District is part of the Constitution, which cannot be revised or repealed by simple legislation, then the residents of the District would live under the proverbial Sword of Damocles, forever in an inferior position, as compared to all other people over whom Congress holds or has held identical powers under the Constitution. When the Defendants sought to confuse the claims made in *Adams* with the claims made in *Alexander* (a venerable defense strategy), the point was raised, again, that collapsing *Adams*' claims into *Alexander*'s claims threatened due process of law. *See, e.g., Adams' Reply to House Officers' Opposition to Summary Judgment* (Mar. 8, 1999; hereinafter, "*Adams' Reply to House Officers' Opposition*") at 3.[14]

The Equal Protection Claim Discussed in the *Memorandum*

The equal protection "argument" addressed in the *Memorandum* is the argument presented in *Alexander*. The initial depiction of the "argument" in the *Memorandum* is framed in a way which occludes the distinctions between the cases, however, and gently bends the claim presented in *Adams*.

> The plaintiffs allege that the lack of representation renders them unequal to the residents of the fifty states and of the federal enclaves. And they further contend that because the right to vote is fundamental, such

[14] "[The House Officers] suggest that this case turns on the proposition whether 'article I, § 2, cl. 1 must be read to permit District residents to vote in congressional elections[.]' These statements make it clear, again, that the Defendants confuse this case with *Alexander v. Daley*. That being the case, due process of law mandates that this confusion be untangled, so the Plaintiffs' unique claims can be addressed on their own merits, rather than subsumed in alien and even antithetical claims."

> unequal treatment cannot be upheld unless it satisfies strict scrutiny – that is, unless it is "narrowly tailored to serve a compelling" government interest. Because there is no compelling interest in denying District residents the vote, plaintiffs contend that the denial cannot satisfy strict scrutiny and hence must fall.

MO at 66 (footnotes omitted), citing *Alexander*'s MSJ at 56. Interestingly, however, in a footnote following the first sentence of this passage, the *Memorandum* states,

> The *Adams* plaintiffs, but not the *Alexander* plaintiffs, also allege that their lack of representation renders them unequal to the residents of Alexandria County, Virginia (formerly a part of the District) as well as to the residents of the states "which started their organized political lives as territories of the Unites States."

MO at 66 n.57, citing *Adams*' MSJ at 51. This footnote itself indicates that *Adams*' equal protection claim was merged *into* the equal protection argument presented in *Alexander*, for the plain grammar of the footnote, juxtaposed to the sentence it follows, means that, *but for* these *additional* comparisons, *Adams* is making the *same* argument as *Alexander*. But this is incorrect, as we have shown above and as we can see by closely parsing the rest of the *Memorandum*.

Adams doesn't argue that present "lack of representation renders them unequal" to anyone. *Adams* argues that Congress, as a matter of historical fact, has treated District residents differently than other, similarly-situated populations with the result that District residents are *excluded* from apportionments of congressional districts which all other, similarly-situated populations are *included* in present apportionments. While the *difference* most at issue in *Alexander* is more a matter of present and future ability of citizens to cast a vote every two years, the difference most at issue in *Adams* is a difference in past and present treatment by Congress, specifically, a difference in how much of Congress's powers of "exclusive Legislation" it chooses to wield over places where it has or has had that power under the Constitution.

Alexander's focus on "representation," moreover, assumes that it can be *conferred* by Congress (pursuant to Court order or on its own) independently of the status by which all other people in the United States have it, *i.e.*, State citizenship, and independently of the plain terms of the Constitution which derive representation in the House and Senate from the power of citizens of the various states to vote. *See Adams*' MSJ at 7-12. Since *Adams* does not believe Congress can or should alter or deviate from the terms of the Constitution, *Adams* focuses on the steps Congress took to honor the rights of the residents of all places under the same power of "exclusive legislation," which was to make them States or parts of States by either ceding *all* its powers to the states over certain places wholesale or by ceding *enough* of its powers to the states over all federal enclaves wholesale and, simultaneously, welcoming the states to exercise their powers within the enclaves, such that the states were allowed by Congress' withdrawal of power to absorb the enclaves into the states.

Examining these statements in light of potential or relevant remedies in each case further sharpens the difference between the equal protection components of each case. It goes without saying that government could either withdraw benefits from the favored populations or extend benefits to the disfavored population as a remedy for denial of equal protection. Under *Alexander*'s equal protection argument (the same discussed by the *Memorandum*), *arguendo*, this would mean Congress could extend "representation" to the District *or* strip *all* Americans of "representation" in Congress, which would mean the end of Congress, since this would leave no one to be represented.

But under *Adams* equal protection claim, Congress could treat the District as it has all other, similarly-situated places, meaning Congress could cede it to a State or could admit it as a State, or Congress could strip state citizenship from all places under Congress' exclusive jurisdiction by reasserting that jurisdiction. As Justice Marshall said in *Evans v. Comman*, "federal enclaves are still subject to exclusive federal

jurisdiction and *Congress could restrict as well as extend* the powers of the States within their bounds[.]" 398 U.S. 419, 423-25 (1970) (emphasis added). Either result is a possibility and the latter would merely return the United States to the relatively darker days when Congress held absolutely exclusive jurisdiction over thousands of *de facto* colonies scattered throughout the United States.

Continuing with the specific language of the *Memorandum*, *Adams* does not challenge Defendants to show a "compelling interest in denying District residents the vote." *Adams* challenges Defendants to show a compelling interest in continuing to exclude District residents from the same present apportionments of congressional districts in which Congress has seen fit to include *all* other, similarly-situated people.

For instance, with regard to the former portion of the District south-west of the Potomac River, Congress, through the Defendants, must show that there is a compelling governmental reason for Congress to retain exclusive jurisdiction over the entire, present District of Columbia, which cannot be satisfied by exercise of that jurisdiction over a smaller area (for instance), even though Congress ceded one third of the original District to Virginia (and then ceded former portions of Maryland which were made parts of the District to Virginia as well). The focus here is not on the generalized "right to vote," but on the specific reasons Congress must show to sustain its powers in the face of the depredations those same powers work on the rights and lives of the people subject to those powers, for while Congress may have *absolute* power, the Constitution nevertheless restrains that power when it trenches on personal *rights*. Likewise, *Adams* Plaintiffs do not "allege that their lack of representation renders them unequal to the residents of Alexandria County, Virginia." *Adams* argues that there is no compelling governmental reason for Congress to have *included* the residents of Alexandria County in apportionments of congressional districts while Congress *excludes* residents of the District.

The crux of the distinction between *Alexander* and *Adams* comes to a head with the conclusion in the *Memorandum* as to whether the Defendants need show a reason for the "unequal" status challenged in *Alexander*. The *Memorandum* says,

> defendants have failed to offer a compelling justification for denying District residents the right to vote in Congress. . . . The problem, however, is that strict scrutiny does not apply in this case. Although equal protection analysis scrutinizes the validity of classifications drawn by executive and legislative authorities, the classification complained of here is not the product of presidential, congressional, or state action. Instead, as we have just concluded [in the Part of the *Memorandum* discussing *Alexander*'s Article I claim, *supra*], the voting qualification of which plaintiffs complain is one drawn by the Constitution itself. . . . "[T]he right to vote in federal elections is conferred by Art. I, § 2, of the Constitution," and the right to equal protection cannot overcome the line explicitly drawn by that Article. For that reason, even the absence of a compelling ground for denying District citizens the right to vote cannot result in the judicial grant thereof.

MO at 66, citation omitted, quoting *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966). It is submitted that this analysis rightly addresses the claims and arguments in *Alexander*, but this analysis falls apart when applied to *Adams*.

To focus on Alexandria County, from 1791[15] until 1846, *the Constitution* did not draw a distinction between Alexandria County (the portion of the District south-west of the Potomac River) and Washington County (the portion of the District

[15] The date when the District first came under Congressional power is debatable, but *Adams* Plaintiffs suggest that it really doesn't make much difference to their legal claims whether it was when Congress received sovereignty (1791), when Congress moved into its new quarters (actually, 1799), when Congress first exercised its power to pass a reasonably comprehensive piece of legislation (1801), or when the Supreme Court first issued a definitive declaration concerning the District's status (1804), for it certainly *happened* and it was certainly *complete* and it was certainly (at least no later than 1804) *dispositive* of the status of the residents of the District under the Constitution.

north-east of the Potomac River), Act of Feb. 27, 1801, 2 Stat. 103, ch. 15, § 2. Rather, they were "one political community, united under one government." *Bank of Alexandria v. Dyer*, 39 U.S. (14 Pet.) 141, 145-46 (1840). After 1846, however, a distinction could be drawn between Alexandria County and Washington County, but this distinction was the *direct result of* "legislative action," as the *Memorandum* seems to use the term: the Act of July 9, 1846, 9 Stat. 35, ch. 35, *reprinted in* 1 D.C. Code 78-79 (1991 repl.); *see Adams'* MSJ at 23 & 36. After this "legislative action," which was not *mandated by* the Constitution but was within Congress' powers under the Constitution, the Constitution *recognized* the distinction, seeing the residents of the former portion of the District as then having become citizens of the State of Virginia. *See Phillips v. Payne*, 92 U.S. 130 (1876).

Thus, when congressional districts were apportioned in 1840, the residents of Alexandria County were *excluded* from those apportionments by virtue of Congress exclusive jurisdiction over them, *see Reily v. Lamar*, 6 U.S. 2 Cranch 344, 356-57 (1804), but when congressional districts were apportioned in 1850, the residents of Alexandria County were *included* in those apportionments by virtue of Congress' legislative act ceding the County to Virginia, *see Phillips, supra*. The *Constitution* didn't change between 1840 and 1850. *Article I* of the Constitution wasn't amended between 1840 and 1850. Rather, the difference in "classification" of Alexandria County between 1840 and 1850 was "the product of . . . congressional . . . action;" Congress used its power over the District of Columbia to move Alexandria County from one category "drawn by the Constitution itself" into another category "drawn by the Constitution itself." quoting MO at 66. These choices and actions undertaken by Congress, as compared to Congress' failure to take action the the remainder of the District may be challenged under the equal protection gurantees of the Constitution.

Adams merely asks, why is this differential treatment legitimate? What are the compelling governmental reasons which require Congress to fence the residents of the District

of Columbia *out* of apportionments of congressional districts, *see Carrington v. Rash*, 380 U.S. 89, 94 (1965), while the residents of one third of the original same District of Columbia, formed to serve the same purposes of government, formed under the very same words of the very same Constitution, are *included* in apportionments? Congress could do for the present District (or all of it outside the National Capital Service Area, to use a convenient but not necessarily absolute indicator of a physical distinction within the District, *see Adams'* MSJ at 27-30) what it did for the former portion south-west of the Potomac River (cede it to a State) or what it did for the continental territories (admit it as a State). *See Adams' Complaint* at ¶ 36. Congress has not done this. The result is denial of a plethora of fundamental rights. *See Adams'* MSJ at 12-18, 52-54. Thus, again, the question is: can Congress legitimate this continual segregation of the residents of the District from the status enjoyed by (among others at issue in *Adams*) the residents of the *former portion* of the District south-west of the Potomac River with reference to compelling and unavoidable governmental necessities?

Pages 67-68 of the *Memorandum* address "plaintiffs' contention that the disparity between their treatment and that of enclave residents violates equal protection[,]" saying:

> notwithstanding the force of the one person, one vote principle in our constitutional jurisprudence, that doctrine cannot serve as a vehicle for challenging the structure the Constitution itself imposes upon the Congress. . . . [T]he inability of District residents to vote is a consequence of Article I. Similarly, . . . the contrasting ability of enclave residents to vote is not the consequence of legislative line drawing, but rather of the Supreme Court's decision in *Evans* [*v. Comman*] that enclave residents have a constitutional right to vote – a holding we are unable to extend to District residents both because of distinctions between the manner in which Congress has exercised its authority over the enclaves and the District, and because of the Supreme Court's decision in *Albaugh* [*v. Tawes*]. Hence, the

> differing treatment is the consequence not of legislative determinations but of constitutional distinctions. This court is without authority to scrutinize those distinctions to determine whether they are irrational, compelling, or anything in between.

MO at 67-68 (footnotes and citation omitted, but cross-referencing Part IV.B.4 of the *Memorandum*). This passage, taken at face value, might seem to foreclose *Adams*' equal protection claims based upon a comparison District residents with residents of federal enclaves, but it cannot. The *reason* it cannot foreclose *Adams*' equal protection claim with regard to the federal enclaves is that this passage reads *Evans* (and *Albaugh*) in light of the claim made in *Alexander*, not in light of the claim *and evidence* presented in *Adams*. Specifically, the reading of *Evans* (and *Albaugh*) in the *Memorandum* ignores the factual history of the federal enclaves, which is apparent within *Evans* itself, and which factual history was introduced into the Record in *Adams* because it is intrinsic to and supports *Adams*' claims, but which factual history was not placed at issue in *Alexander*. But to illustrate these points, we must diverge to analyze *Evans*.

Evans v. Comman, as Discussed in *Adams*

In *Evans v. Comman*, 398 U.S. 419 (1970), the Supreme Court affirmed the judgment of another Three-judge District Court (convened under a different, now-repealed provision of the United States Code (28 U.S.C. § 2281)), reported as *Comman v. Dawson*, 295 F.Supp. 654 (D.Md. 1969). Dr. Tillye Comman and her eleven co-plaintiffs lived on the campus of the National Institutes of Health ("NIH"), a federal enclave north of Bethesda, Maryland. Until October 19, 1968, ten of the plaintiffs had been registered to vote in Maryland, but were informed on that date that their names would be removed from the rolls. They filed suit for declaratory judgments and injunctions to prevent removal of their names and to require registration of the other two plaintiffs. 295 F.Supp. at 655. The reported opinion doesn't make it completely clear why the Montgomery County Board of

Registry notified the plaintiffs that their names would be *removed* from the rolls, but the opinion indicates it was because of an opinion issued by the highest court of the State of Maryland in *Royer v. Board of Election Supervisors*, 231 Md. 561, 191 A.2d 446, *cert. denied*, 375 U.S. 921 (1963). 296 F.Supp. at 655; *accord Evans v. Comman*, 398 U.S. 419, 421 (1970) ("It was the *Royer* decision that promoted the action of the election officials in the present case.").[16]

In *Royer*, the Court of Appeals of Maryland had stated that "the weight of authority, and virtually all the earlier cases, support the proposition that residents of Federal enclaves, where the federal government has exclusive jurisdiction, are not state residents for voting purposes." 191 A.2d at 449.[17] *Royer* based this conclusion on an earlier Maryland case, *Lowe v. Lowe*, 150 Md. 592, 133 A. 729 (1926), and on a number of cases from other States, all of which reached the same conclusion. 191 A.2d at 449. This pattern of historical

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[16] The author of this *Analysis* learned some additional background facts which led to *Comman v. Dawson* from Ms. Comman's attorney and from one of the defendants in that case. In essence, the Board of Registry had simply been unaware of Maryland law as it had been stated in *Lowe* and (more importantly, perhaps) didn't have the informational tools to readily identify those residence addresses within the NIH enclaves, but once *Royer* was handed down, all county registrars were reminded of Maryland law by the Attorney General and, by the mid-1960s, Montgomery County had a street directory which identified which addresses were within the NIH enclave, so the office was constrained to enforce Maryland law that federal enclaves were extraterritorial to the State.

But these additional facts leading to *Comman* don't alter the larger legal analysis, since the facts important to *Comman* are clear without addition of unreported, anecdotal background to the case and since the Supreme Court's analysis went to all enclaves, none of which shared with NIH the fact that residents had ever been allowed to vote in contravention to state law. *Comman* was ripe to be filed when the Montgomery County Board of Registry (defendants) enforced (howsoever belatedly) the long-standing law of the State of Maryland, as it had been stated in *Royer* and earlier Maryland cases, *see Adams' Response to Paul Stauss, Amicus Curiae* (Apr. 1, 1999) at 2-4, and that's sufficient for the larger analysis. Thus, the same outcome could have followed from a case filed in any one of thousands of other places, all of which were subject to the same changes in legal status.

[17] *Royer* also compares the enclaves to the District of Columbia, though only to show that a claim of "no taxation without representation" carries no water. 191 A.2d at 449. *Royer* does not address the question whether other claims or comparisons might be made.

legal fact was set out (along with citation of some of the most telling cases and sources) in *Adams' Memorandum in Support of Summary Judgment* at pages 37-43. The entire text of one volume of a Report cited in footnote 4 in *Comman v. Dawson* (the volume setting out the factual history and status of federal enclaves) was submitted into the Record in *Adams* in support of summary judgment (exhibit tabbed "V") and this Report substantiates the factual history of the federal enclaves as "extraterritorial" to the states for the first century and a half of American history.

Thus, at the time *Comman v. Dawson* (affirmed *sub nom Evans v. Comman*) was filed, the law of the State of Maryland, like the law in all other States, was that residents of federal enclaves *were not* citizens of the State for political (voting) purposes (despite a period in which individuals at one federal enclave within the State of Maryland – NIH – were allowed to register and vote as if they were citizens of Maryland). *See Adams' Response to Memorandum of Paul Strauss, Amicus Curiae* (Apr. 1, 1999), esp. at 2-3 n.3 (citing seventeen Opinions of the Attorney General of Maryland to the same effect); *accord* 6 Op. Att'y Gen [United States] 577 (1854).[18]

Against this backdrop, *Comman* makes five points clear. First, so long as Congress retains *exclusive* jurisdiction over a place, residents of that place are not citizens of any State.

> Ever since *Opinion of the Justices*, 42 Mass. 580 (1840), and *Sinks v. Reese*, 19 Ohio St. 306 (1869), it has been held in most of the cases considering the question that where the federal government has exclusive jurisdiction of an enclave, persons residing in such enclave are not state residents for voting purposes.

Comman, supra, 295 F.Supp. at 656. Second, the historic pattern of treatment of federal enclaves, which grew out of a plain language construction of the District Clause of the

[18] "I am not aware . . . of any legal authority, which contradicts . . . the point of the complete extraterritoriality of places held by the United States for military uses, with assent of the State in which they lie. It seems to me, to be the plain reading and signification of the Constitution. In my opinion, therefore, [the people] actually residing in the limits of [federal enclaves] do not possess the civil and political rights . . . of citizens of the State[s] . . . ." *Id.* at 582.

Constitution, art. I, § 8, cl. 17, had changed by the time *Comman* was filed in 1968. 295 F.Supp. at 656 & n.4. Thus, third, if Congress cedes increments of jurisdiction over a federal enclave to a State, the place ceases to be severed from the State as a matter of legal or constitutional necessity. 295 F.Supp. at 658 ("The rationale of the earlier decisions denying the right to vote to a resident of a federal enclave has been undercut by the various retrocessions by Congress of its otherwise exclusive jurisdiction."). Fourth (the point where the legal question presented in *Comman* surfaces), if the State exercises enough jurisdiction to treat the residents as State citizens of enough purposes, the State may not continue to deprive the residents of all benefits of State citizenship.

> We conclude that on balance the plaintiffs here are treated by the State of Maryland as *state residents* to such an extent that it is a violation of the Fourteenth Amendment for the State to deny them the right to vote. A state may not subject an individual who resides within its geographical boundaries to substantial obligations of citizenship and at the same time deny such individual the correlative right to exercise a voice in defining the nature and extent of such obligations. . . . [W]e are of the opinion that the incidents of jurisdiction exercised by Maryland over these plaintiffs are sufficiently weighty that the important right claimed here cannot be constitutionally denied.

295 F.Supp. at 659 (emphasis added). And fifth (the point where the legal question presented in *Adams* surfaces), *Comman* confirms that the first and original power *to change* the status of the people who reside under Congress powers of "exclusive jurisdiction" lies with Congress and the change *results from* "the enactments" *of* Congress.

> In the earlier cases, there was little doubt that the United States had exclusive jurisdiction over the [federal enclaves]. However, the issue is presented in a somewhat different light in [this] case *as a result of the enactment by Congress* of various statutes which have effected a retrocession to Maryland and other states of

portions of the federal government's exclusive jurisdiction over federal enclaves and the exercise by Maryland of the *powers which Congress has returned* to the State.

Where the federal government has exclusive jurisdiction over land located within the geographical boundaries of a state, *it can hardly be doubted* that no constitutional right of a resident of the enclave is infringed by the state's refusal to grant such resident the right to vote. But it would be equally clear that *if there were a retrocession by the federal government* to a state of all or substantially all incidents of jurisdiction, such state could not constitutionally deny residents of the enclave the right to vote. The facts of the present case lie somewhere in between these readily demonstrable extremes. The question here is whether Maryland has undertaken to impose on residents of this federal enclave obligations and duties of state citizenship to such a degree that it would amount to unconstitutional discrimination if the right to vote were not *likewise* granted. Determination of this question requires a balancing of *the incidents of jurisdiction still retained by the federal government against those exercised by the State of Maryland* as well as consideration of the nature of the right that plaintiffs claim has been denied to them.

Comman, supra, 295 F.Supp. at 656 (emphasis added, footnote omitted).

Thus, while *Comman* itself was framed as a challenge to a provision of the Maryland Constitution, 295 F.Supp. at 655 ("The provision of the Maryland Constitution under attack . . ."), that challenge only arose *after* a long pattern of events which changed the status of the federal enclaves in Maryland (and elsewhere throughout the country).

> [A] catalog[ ] of State and federal enactments indicates that the concept of federal jurisdiction over [federal enclaves] such as the one here involved has been drastically altered within the past 40 years. The plaintiffs

> here may be prosecuted under State criminal statutes, are subject to State unemployment and workmen's compensation laws, and have access to the State courts under acts permitting divorce and adoption proceedings. However, they have no voice in the selection of legislators who may amend these statutes or enact new ones which will affect their rights as to these matters. The children of these plaintiffs attend local schools in Montgomery County. Yet their parents have no voice in the selection of members of the school board. Income, sales and gasoline taxes are undeniably major sources of revenue for the State of Maryland. Although the plaintiffs here are compelled to pay such taxes, they may not participate in the election of the legislators responsible for the enactment of tax statutes within the State.

295 F.Supp. at 657-58. And the District Court in *Comman* recognized that this change could be reversed by Congress as easily as it had been effected, for "the federal government still retains wide authority over this federal enclave[.]" 295 F.Supp. at 658. This point would be stressed again by Justice Marshall, when the Supreme Court affirmed the District Court.

The Supreme Court's consideration of *Comman* opens with a brief history of the National Institutes of Health, sufficient to set the stage. The Court then frames the question of how NIH, as a federal enclave, relates to the State of Maryland, saying,

> Appellees clearly live within the geographical boundaries of the State of Maryland, and they are treated as state residents in the census and in determining congressional apportionment. They are not residents of Maryland only if the NIH grounds ceased to be a part of Maryland when the enclave was created. However, that 'fiction of a state within a state' was specifically rejected by this Court in *Howard v. Commissioners of Louisville*, 344 U.S. 624, 627 . . . (1953), and it cannot be resurrected here to deny appellees the right to vote.

Evans v. Comman, 398 U.S. 419, 421-22 (1970). Thus, *Evans*

seems to open by affirming a flat rejection of the "extraterritoriality" doctrine which had defined the federal enclaves for 150 years. Since this is based on *Howard v. Commissioners of Louisville*, 344 U.S. 624 (1953), a short digression to examine *Howard* is in order, to see what was being reaffirmed in *Evans*.

Commissioners of Sinking Fund of Louisville v. Howard, 248 S.W.2d 340, *aff'd*, 344 U.S. 624 (1953), arose when a governmental agency of the City of Louisville, Kentucky redefined the boundaries of the City to include a portion of a federal enclave. In discussing the facts of the case, the Kentucky court opened with the admission of the extraterritoriality doctrine, saying,

> [Established doctrine holds] that the state is ousted of any jurisdiction to exercise sovereignty within an area under the exclusive jurisdiction of Congress. But in the case before us, the act of annexation by the city did not, of itself, represent any effort or attempt by the city to exercise jurisdiction within the area of the ordnance plant. The city merely elected that the area be included within its geographic boundaries as a political subdivision of the state.
>
> We are impressed with the argument on behalf of the city that the annexation involved only a question of political geography, and not a clash of political sovereignties. Certainly, it could be of no concern to Congress, in which of its political subdivisions a state chose to consider a Federal area to be physically situated. Whether the ordnance plant is considered to be in Louisville or outside of Louisville could in no way affect the exclusive jurisdiction of Congress to govern the area embracing the plant.

248 S.W.2d at 342 (original emphasis removed and present emphasis added). But this wasn't just abstract drawing of lines on a map, for the Court went on to note the same incipient alteration of jurisdictional relationships which proceeded apace and led to *Comman v. Dawson*.

> [W]e . . . [have] held that [4 U.S.C. § 106] *constituted a recession* by the Federal Government, to the state, of a portion of the exclusive jurisdiction theretofore possessed by Congress, and that acceptance of such recession on the part of the state would be presumed in the absence of the showing of a contrary intent.
>
> Under the Davis case, and those from other jurisdictions therein cited, it would appear that a Federal area within the geographic boundaries of a state lies dormant, so far as concerns the authority of the state to exercise jurisdiction within the area, as long as Congress retains exclusive jurisdiction, *but when Congress recedes part of its jurisdiction* the area comes back to life as a part of the state to the extent of the recession. It seems to us that, even before a recession of jurisdiction by Congress, the state should have the right to determine in which of its political subdivisions a Federal area shall be deemed to be located, anticipating a recession of jurisdiction, such as the one in this case, that will extend to the political subdivisions as well as the state.
>
> Actually, in the case before us, *Congress had receded part of its jurisdiction* to Kentucky, and to the political subdivisions of Kentucky, prior to the annexation by Louisville. The recession recognized that the land was located in Kentucky, not only with reference to the jurisdiction of the state, but also with reference to the jurisdiction of political subdivisions of the state.

248 S.W.2d at 342 (original emphasis removed and present emphasis added). So *Howard* arose after and in light of some of the same *retrocessions* of authority which were later cited in *Comman* (and *Evans*) as proof that Congress has refused truly *exclusive* jurisdiction over the enclaves, in order to allow the States to exercise some jurisdiction over the enclaves. In light of the fact that Congress had started to cede jurisdiction back to the States (or sometimes to the States *de novo*, where Congress exercised exclusive jurisdiction over a place formerly within a continental territory but "reserved" from

State jurisdiction when the territory was admitted), Kentucky deemed its actions merely to be "in anticipation of" potential future cessions or for clarification of the scope of past cessions.

Thus, on one hand, *Howard* (in both the Kentucky Court of Appeals and in the Supreme Court) followed and was occasioned by the *same* change of status effected by Congress' action as was later at issue with reference to the political rights of enclave residents in *Comman* and *Evans*. On the other hand, *Howard* recognized that federal and state jurisdiction did not have to be at odds; they could coexist. *See Brandenburg Telephone Co. v. South Central Bell Tel. Co.*, 506 S.W.2d 513, 516 (Ct. App. Ky. 1974) ("annexation did not represent an effort by the city to exercise sovereignty within the federal enclave, but merely was a matter of political geography." (construing *Commissioners of Sinking Fund*)).

This latter point was central to the Supreme Court's treatment of the case.

> The appellants first contend that the City could not annex this federal area because it had ceased to be a part of Kentucky when the United States assumed exclusive jurisdiction over it. With this we do not agree. When the United States, with the consent of Kentucky, acquired ths property upon which the Ordnance Plant is located, the property did not cease to be a part of Kentucky. The geographical structure of Kentucky remained the same. In rearranging the structural divisions of the Commonwealth, in accordance with state law, the area became a part of the City of Louisville, just as it remained a part of the County of Jefferson and the Commonwealth of Kentucky. A state may conform its municipal structures to its own plan, so long as the state does not interfere with the exercise of jurisdiction within the federal area by the United States. Kentucky's consent to this acquisition gave the United States power to exercise exclusive jurisdiction within the area. A change of municipal boundaries did not interfere in the least with the jurisdiction of the United

> States within the area of with its use of disposition of the property. The fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries, *so long as there is no interference with the jurisdiction asserted by the Federal Government. The sovereign rights in this dual relationship are not antagonistic. Accommodation and cooperation are their aim. It is friction, not fiction, to which we must give heed.*

Howard v. Comm'rs of Sinking Fund, 344 U.S. 624, 626-27 (1953). The Supreme Court offered no further discussion or explanation for what seemed to be a 180 degree reversal of 150 years of legal doctrine defining the status of the federal enclaves as "extraterritorial" to the States, but two points suffice to explain it. First, the Supreme Court was working with the same *physical* or *geographic* sense of the enclave at issue, which had been important to the lower court. Thus, creation of the enclave did not remove it physically or geographically from its former place. Second, the Supreme Court was also working with a place over which Congress had *ceded* some authority *to the State*.

> Even thought the Ordnance Plant is within the boundaries of the City of Louisville pursuant to the annexation, exclusive jurisdiction over the area remains with the United States, except as modified by statute. Within this jurisdiction, the right to tax income paid to employees of the Government who worked at the Ordnance Plant was granted by . . . the Buck Act.

344 U.S. at 627 (citations omitted); *compare id.* at 629 (Douglas, J., dissenting on point whether the tax which triggered the case fell within the cession from Congress). So while *Howard* defined a new doctrine for the federal enclaves, it was a doctrine which nevertheless acknowledged the former doctrine and acknowledged that Congress had *changed* the status of the enclaves by ceding increments of jurisdiction to the States. This pattern only proceeded apace following *Howard*. *See generally Federal Legislative Jurisdiction; Report Prepared for Public Land Law Review*

Commission by the Land and Natural Resources Division (1969) (attached to *Adams' Reply to Clinton's Opposition* as Exhibit Y).

Thus, in *Evans*, the Supreme Court addressed a much-changed situation for the federal enclaves, which was no longer governed by the earlier line of cases and decisions which had previously defined the federal enclaves.

> We need not consider . . . whether the[ ] early cases would met the requirements of the Fourteenth Amendment, for the relationship between federal enclaves and the States in which they are located *has changed considerably* since they were decided. As the District Court noted, *Congress has now permitted* the States to extend important aspects of state powers over federal areas.

Evans, supra, 398 U.S. at 423. So the factual threshold for *Comman* and *Evans* was a wholesale change in the status of federal enclaves. This change had been *effected by* Congress.

After Congress ceded authority to the States, ceasing to *exclude* them from exercising their powers within the enclaves, the States had started imposing taxes and regulations on the residents of the enclaves. After being subjected to such State *obligations*, enclave residents started demanding State *privileges*, such as voting. Then *Comman* and *Evans* arose. The State of Maryland (merely the most convenient forum for a test case) resisted full incorporation of the enclaves into the political identity of the State by arguing that, *even though* it treated enclave residents as State citizens for *some* purposes, enclave residents were not sufficiently interested in State affairs to be treated as State citizens for *all* purposes. "According to [Maryland], NIH residents are substantially less interested in Maryland affairs than other residents of the State because the Constitution vests 'exclusive Legislation in all Cases whatsoever' over federal enclaves to Congress." *Evans, supra*, 398 U.S. at 423. To this, the Supreme Court responded,

> [enclave residents] are as concerned with state spending and taxing decisions as other Maryland

residents, for Congress has permitted the States to levy and collect their income, gasoline, sales, and use taxes – the major sources of state revenue – on federal enclaves. . . . [O]ther differences asserted between Maryland residents who live on federal enclaves and those who do not . . . are far more theoretical than real. In any case, these differences, along with whatever others may exist, do not come close to establishing that degree of disinterestedness in electoral decisions that might justify a total exclusion from the franchise.

398 U.S. at 424, 425-26 (footnote omitted).

In the course of his analysis, however, Justice Marshall offered a critical observation: the underpinnings of the Court's conclusion could be removed and residents of federal enclaves again be plunged into political purgatory by congressional action:

> While it is true that federal enclaves *are still subject to exclusive federal jurisdiction* and *Congress could restrict as well as extend* the powers of the States within their bounds, whether appellees are sufficiently disinterested in electoral decisions that they may denied the vote depends on their actual interest today, not on what it may be sometime in the future.

398 U.S. at 423-24 (emphasis added; citation omitted). In other words, Congress might have given, but Congress retains the power to take it away.

So the fact that the residents of NIH vote today depends upon their being citizens of Maryland. Their status as citizens of Maryland depends upon their residence within a place within the State of Maryland. Whether NIH is a place within the State of Maryland depends upon whether the State of Maryland has jurisdiction over the place. Whether the State of Maryland has jurisdiction over NIH and all other federal enclaves depends upon decisions Congress has made and can make. Presently, Congress allows it, so Maryland has and exercises jurisdiction over the federal enclaves physically within the State, so the residents of the federal enclaves physically within the State of Maryland are citizens of the State

of Maryland for all purposes (and the State cannot discriminate against them).

> The Supreme Court in *Evans v. Comman* . . . expressly disapproved of the holding in *Royer v. Bd. of Elec. Sups.*, [231 Md. 561, 191 A.2d 446, *cert. denied*, 375 U.S. 921 (1963)], and disapproved of the principles set forth in both *Royer* and *Lowe* [*v. Lowe*, 150 Md. 592, 133 A. 729 (1926)]. *Evans v. Comman*, also involving residents of an "exclusive" federal enclave in Maryland, held that such persons [*are*] *residents of Maryland*, were entitled to vote in Maryland elections, were subject to Maryland taxes, and were subject to numerous other Maryland laws. . . . Consequently, the *Lowe* and *Royer* cases are overruled.

Hansford v. District of Columbia, 329 Md. 112, 132-33, 617 A.2d 1057, 1066-67 (Md. 1993) (emphasis added).

This extensive treatment of *Evans* allows us to say something of the difference between *Adams*' and *Alexander*'s reasons for citing *Evans*. In the context of *Adams*' claims and arguments, *Evans* is a judicially noticeable source for *facts* concerning the federal enclaves. Specifically, *Evans* shows the factual situation which *follows* Congress' exercise of its powers of exclusive legislation to govern the federal enclaves, using those powers to give powers of local governance to or back to the States, such that the federal enclaves become incorporated into the political fabric or identity of the States. *Evans* shows that happens when Congress used its power to respect the fundamental rights of the residents of the federal enclaves.

In contrast, in the context of *Alexander*'s claims and arguments, *Evans* is used as legal authority for *Alexander*'s proposal that Congress should use the same powers of exclusive legislation to govern the District of Columbia to replicate, legislatively, some derivative form of a single result of Congress' use of those powers over the federal enclaves. For *Alexander*, *Evans* shows that Congress has the power to do for the District what it did for the enclaves (*Adams* disagrees with these assertions and asserts that *Evans* does

not show that Congress has the power to trump a State's residence requirements for voting in state or federal elections).

But in this sense, it might be said that *Alexander* misunderstands the situation of residents of the federal enclaves. *Alexander* speaks as if the federal enclaves are *not* really political parts of the States, as if Congress has conferred some sort of "quasi state citizenship" on enclave residents, for limited purposes. In fact, this is not correct and *Evans* shows it. *Evans* makes it clear that the residents of federal enclaves are not partial citizens; they are *fully* citizens of the States. Certainly, subsequent cases support this conclusion (frequently following and citing *Evans*). *See, e.g., Cobb v. Cobb*, 406 Mass. 21, 24-25, 545 N.E.2d 1161, 1163 (Mass. 1989); *Olson v. Dept. of Revenue*, 223 Mont. 464, 468, 726 P.2d 1162 (1986); *Opinion of the Justices*, 118 N.H. 347, 349, 387 A.2d 333, 335 (N.H. 1978); *United States v. Lewisburg Area School Dist.*, 539 F.2d 301, 306 (3d. Cir. 1976).

Before returning to the Three-judge District Court's analysis of *Evans* in its *Memorandum*, recall the essence of *Adams*' equal protection claim. Once upon a time, Congress exercise of the power of "exclusive Legislation" or exclusive jurisdiction over the federal enclaves and over the District of Columbia meant that the residents of the federal enclaves and the District of Columbia were not citizens of any State, so were deprived of a variety of political rights.

> [T]here is a uniform current of authority from the beginning of the government . . . – all to the effect that [federal enclaves are] not part of [any] state. . . . When you apply this rule to this case, it excludes all state authority whatever. . . . [State voting registrars] have no right to put any persons upon the registry list except qualified voters, and those qualifications are prescribed in the constitution, and they are, among others, that a man must be a resident of the state. In the argument of counsel the District of Columbia is spoken of. *There is no distinction, and can be none, between the resident of the District of Columbia and [federal enclaves]*. You will

> see in the constitution of the United States the provision as to jurisdiction is all in the same section. . . . We all know that *the District of Columbia was ceded by the state of Maryland to the United States, and no resident of the District votes anywhere; and of course a resident* [*of a federal enclave*] *occupies the same relation to the government* [*of a*] *state . . . as a resident of the District of Columbia does to the state of Maryland. He has no right to vote.* The effect of this is to exclude from the right to vote persons who have no other qualifications as residents except a residence [within a federal enclave physically within the outer boundaries of a State].

In re Town of Highlands, 48 N.Y. Sup. Ct. 795, 22 N.Y.S. 137, 139-40 (Sup. Ct. 1892) (emphasis added) (the case concerned West Point, in New York state). Then, through a series of enactments which the Supreme Court affirmed (in *Howard* and *Evans*) to be cessions or retrocessions of authority to the States, the status of the residents of the federal enclaves was changed. As one court has said,

> Citing *Howard* to reject the notion of nonresidency in the state, and *brushing aside early cases to the contrary* by noting that "*the relationship between the federal enclaves and the State in which they are located has changed considerably*," the [Supreme] Court [in *Evans*] struck down the state's action on equal protection grounds. The *Howard* and *Evans* decisions effectively *repudiated the traditional notion of extraterritoriality* of federal enclaves, a notion which viewed the exclusive legislative power as "in essence complete sovereignty." Yet *the full implications of this repudiation have yet to be addressed* by the appellate courts.

Economic Development and Indus. Corp. v. U.S., 546 F.Supp. 1204, 1209 (D. Mass. 1982) (quoting *Evans* at 423 and *S.R.A. v. Minnesota*, 327 U.S. 558, 562 (1946)) (emphasis added; footnotes and citations omitted).[19] At the same time, Congress took no such action for the District of Columbia. In

[19] The District Court's concluding sentence remains true today, though *Adams* brings what is arguably the single most troubling "implication" before the courts.

1892 (*see In re Town of Highlands, supra*), all the residents of the federal enclaves and the District of Columbia were in one, decrepit boat. By 1970, Congress had picked up and moved the residents of all the federal enclaves onto dry land. *Adams* asks, "why them and not us?"

Evans v. Comman, as Discussed in the *Memorandum*

Evans v. Comman is discussed at pages 62-65 of the *Memorandum*. The discussion in the *Memorandum* is framed in light of the perception that "Plaintiffs here argue that since the residents of federal enclaves are entitled to vote under Evans, the residents of the District should be so entitled as well." MO at 63. Though this reflects the arguments made in *Alexander*, it does not reflect the arguments made in *Adams* (note, as the discussion in the preceding section of this Analysis makes clear, *Adams* shows that residents of enclaves are *not* "entitled to vote *under*" *Evans*; they are entitled to vote because Congress ceded its exclusive authority over the residents of the enclaves to the States and the States assumed authority over the residents of the enclaves).

After reciting various points in *Evans*, the *Memorandum* states that, "the fact that Congress may have identical *authority* over both the District and the enclaves is not dispositive, because the ultimate result in *Evans* rested on the fact that Congress had not *exercised* that authority over NIH." MO at 64 (footnote omitted; emphasis in original). In a limited and technical sense (and insofar as *Alexander* argued the issue), it may be said this passage recounts the facts of NIH itself correctly, for Congress didn't obtain a formal cession of "exclusive jurisdiction" from Maryland until 1953, Md. Code Ann. art. 96, § 34, by which time Congress had *already* made general cessions of authority *back* to the States, which cessions were taken by the District Court in *Comman* and by the Supreme Court in *Evans* to be sufficient to *re-vest* political authority over the enclaves in the States. The net effect of these facts make it possible to say for NIH that, *in retrospect*, Congress might never have had truly "exclusive" jurisdiction over NIH, since by the time Maryland *ceded* "exclusive

jurisdiction" over NIH to Congress, Congress has already made a general *retrocession* of *some* jurisdiction *back* to Maryland. So maybe Maryland's cession of jurisdiction over NIH just "bounced." But the *Memorandum* is incorrect as regards federal enclaves *generally* (as *Adams* argued the issue), for most enclaves (such as West Point in New York State, *see supra* at 57) had been under Congress' exclusive jurisdiction for over a century prior to the Supreme Court's analysis in *Evans*, and this fact is not controverted or questioned by the Supreme Court in *Evans*.[20]

Thus, the ultimate result in *Evans* – that no residents of *any federal enclaves* can be excluded from full state citizenship where the States have obtained or re-obtained political jurisdiction over the enclaves within their geographical boundaries – *cannot* "rest on the fact that Congress had not exercised" its authority over the enclaves, because the facts and law are clearly to the contrary; Congress *had* exercised that authority for some 150 years, as the uncontroverted evidence presented in *Adams* proves. *Evans*, therefore, cannot really rest on the fact that Congress *has not exercised* its authority over the enclaves; *Evans* must and does rest on the fact that Congress *relinquished* its authority (albeit in increments, many of which are cited in *Comman*, 295 F.Supp. at 657, and in *Evans*, 398 U.S. at 424).[21] Indeed, Congress had

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[20] Technically, the *Memorandum* does not *rebut* this and the following propositions discussed in *Adams*. Rather, the *Memorandum* simply *ignores* them since, it appears, they were not presented in *Alexander*. So when we say that the *Memorandum* is "incorrect," we do so in light of facts which are clear in the Record in *Adams* but which were not addressed or discussed in the *Memorandum*, again, it appears, because the *Memorandum* concerns itself solely with the claims and arguments presented in *Alexander*.

[21] The *Memorandum* is correct, therefore, in saying that "Congress delegated authority to another sovereign (Maryland), and the Court [in *Evans*] held that sovereign could not treat two classes of residents (those within and without the enclave) differently." MO at 64 n.54. But this correct summary of *Evans* doesn't bear upon the equal protection claim presented in *Adams*, for *Adams*' claim turns on facts which *preceded* the facts at issue in *Evans*: specifically, the fact that "Congress delegated authority to another sovereign" regarding the enclaves, *but has not done so* for the District. *Adams* agrees with the Three-judge Court majority at MO at 64 n.54, however, in saying there is no comparison between *cession of sovereignty* to a State and *delegation of authority* to the home rule government of

exercised its powers of exclusive Legislation, U.S. Const., art. I, § 8, cl. 17, over thousands of federal enclaves, with the result that millions of people within the enclaves were deprived of all political rights, and these facts led to the reports cited by the District Court in *Comman, Jurisdiction Over Federal Areas Within the States; Report of the Interdepartmental Committee for the Study of Jurisdiction over Federal Areas Within the States; Part I: The Facts and Committee Recommendation* (1956). 295 F.Supp. at 656 n.4; *see* pages 19, 43, 53-55, 57, & 69 of the *Report* (this report was submitted in support of summary judgment by *Adams*). Congress' relinquishment of this authority is at the heart of *Adams*' equal protection claim.

Likewise, when *Evans* is broken down into a two-step analysis in the *Memorandum*, saying,

> There appear to have been two steps to the *Evans* analysis. First, in rejecting the "fiction of a state within a state," the court rejected the suggestion that the NIH grounds ceased to be part of Maryland when the enclave was created. The rationale for this declaration was unstated, other than by reference to the Court's prior similar statement in *Howard*. . . . [Second], the Court . . . went on to consider whether enclave residents had a stake in the elections equal to that of other Maryland residents.

MO 64 n.55, it correctly synopsizes *Evans*, but frames historical fact in a way which occludes all history prior to *Howard* (if not everything prior to *Evans*), which necessarily occludes the equal protection claim, arguments, and evidence presented in *Adams*. While the entire history of Congressional treatment of the federal enclaves isn't illustrated in its full depth and breadth in *Evans*, that history is *apparent* on the face of the Supreme Court's analysis and that history becomes inescapable as one reviews the cases on which *Evans* stands, such as *Comman*, *Royer*, and *Howard*.

Evans arose from a coherent history: for 150 years, Congress' exercise of exclusive jurisdiction over federal enclaves most certainly was taken to make the enclaves

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the District. *See Adams' Complaint* at ¶¶ 25-26, 35-36, 46-47, 52-55.

"extraterritorial" to the States. *See, e.g.*, 6 Op. Att'y Gen [United States] 577, 582 (1854). So, in reality and as relevant to the equal protection claim and arguments in *Adams* (and as shown by the evidence submitted in *Adams*), *Evans* actually proceeded according to *three* steps, not two, as is suggested in the *Memorandum* in note 55, *supra*. The *first* step, overlooked in the *Memorandum*, was that Congress relinquished its exclusive jurisdiction over the federal enclaves, so they were no longer "extraterritorial" to the States by the time of *Howard* and certainly not by the time of *Comman*.

So, when it is said in footnote 53 of the *Memorandum* (MO at 64) that "the three-judge district court whose decision the Supreme Court affirmed [in *Evans*] expressly distinguished that case from a hypothetical in which the federal government did assert exclusive jurisdiction over an enclave[,]" the *Memorandum* might reasonably be read to recount the specific facts of NIH, but this reading necessarily ignores the facts of the federal enclaves generally, which were before the Court in *Adams*. In light of those facts, it becomes clear that the District Court in *Comman* was not just testing its analysis against an abstract "hypothetical;" it was considering an alternative in which Congress *had not ceded* jurisdiction to the States but *had kept* the jurisdiction it had exercised itself for 150 years. Thus, the equal protection question presented in *Adams* turns upon events which had already transpired before *Comman* (affirmed in *Evans*) was filed: that Congress had changed the status of the federal enclaves but did not change the status of the District of Columbia. *This* difference in treatment is not addressed in *Comman* or in *Evans*, because that part of it concerning the enclaves was a "given," was an element of the case in *Comman*, which neither the plaintiffs nor defendants in *Comman* contested, and the status of the District of Columbia was of no interest to any party in *Comman*.

So when it is said in the *Memorandum* that, "[i]t was Maryland's exercise of authority over the [federal enclaves] that gave [enclave residents] 'a stake equal to that of other

Maryland residents[,]'" MO at 64, the *Memorandum* is correct, but when the *Memorandum* continues, intending to distinguish NIH from "[t]he case [sic] before us" on the ground that "Congress has ceded none of its authority over the District back to Maryland, and Maryland has not purported to exercise any of its authority in the District[,]" MO at 64, the *Memorandum* is answering the equal protection claim presented in *Alexander* and simply ignoring the equal protection claim presented in *Adams*. *Alexander* argued that residents of the District were already entitled to vote in Maryland by virtue of "residual citizenship" in Maryland, *Alexander*'s MSJ at 3-4, 47, 51, so it was reasonable for the *Memorandum* to address the question as to how much authority Congress had ceded back to Maryland to effectuate or recognize this "residual citizenship." Conversely, *Adams* is clear that the District is wholly separate from Maryland, still under the purest and most extreme form of the doctrine of "extraterritoriality." *See Adams' Complaint* at ¶ 35; *Adams' Reply to Clinton's Opposition* at 1 n.1, 8-9; *Adams' Reply to Committee for the Capital City*, generally. So Congress' failure to cede any authority or jurisdiction over the District to Maryland *is an element of Adams'* equal protection claim. The claim cannot be answered by reference to one of its predicate facts; this would be what logicians call "begging the question."[22]

The discussion in the *Memorandum* following these points only makes it clearer that the equal protection claim and arguments being analyzed are those in *Alexander*, with no consideration given to the antithetical claim and arguments and evidence presented in *Adams*. The *Memorandum* says,

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[22] Joseph G. Brennan, *A Handbook of Logic*, 218-20 (2d ed. 1961) ("This fallacy occurs in any argument in which we assume as true what is to be proven. . . . The circular nature of the argument is . . . apparent[in that,] in order to prove the conclusion . . . , the truth of [the conclusion] has been assumed in the major premise."); Morris R. Cohen and Ernest Nagel, *An Introduction to Logic and Scientific Method*, 379 (1934) ("It is . . . a fallacy to claim to have proved a proposition at issue if it has been smuggled . . . into our premises."). We don't mean to be pedantic on this point; merely to make it clear that we have no use for the current use of this phrase to mean something akin to "leaves open the question . . ." or "makes it more imperative to answer the question . . .".

"[p]laintiffs [sic] do not dispute this distinction" between Congress' cession of authority over the enclaves to the States and Congress' failure to cede authority over the District to any State, "and as a consequence do not contend that they have a right to vote in elections for the Maryland state legislature." MO at 64. Note that one component of the *declaratory* relief requested in *Adams* is as follows:

> The Plaintiffs and all citizens of the District of Columbia have the right to enjoy republican forms of government, such as are inherent in a federal system, which means that . . . [*t*]*he citizens of the District have the right to participate through duly elected representatives in a state government* insulated from Congressional interference in matters properly within the exclusive competence of state governments, as evidenced by the Tenth Amendment to the Constitution[.]

Adams' Complaint at 23, relief paragraph A.2.b (emphasis added). So, contrary to the reading of *Alexander* in the *Memorandum*, Plaintiffs in *Adams do contend* that "they have a right to vote in elections for [a] state legislature" (even though the Court cannot make the District a State or part of a State, as discussed elsewhere in this Analysis).[23]

Having disposed of the enclave claim presented in *Alexander*, the *Memorandum* then addresses *Alexander*'s more direct claim that District residents have an interest in representation in Congress "equally vital" to "other Maryland residents." MO at 64, quoting *Alexander*'s MSJ at 27. The response to this argument in the *Memorandum* is in complete conformity with the claim made in *Alexander*, yet (again) begs the question presented in *Adams*. The *Memorandum* says:

[23] While the Court cannot order the ultimate status which might reify this right and should be reluctant to express an opinion how it might be realized or made effective, it is within the Court's power under 28 U.S.C. § 2201 to declare that this is *among* the Plaintiffs' *rights*, leaving it to the Plaintiffs to work toward realization of this right by the proper courses of conduct, though proper political procedures. This pattern of recognizing a right without more is not unusual. For instance, in *Cohen v. California*, 403 U.S. 15 (1971), the Supreme Court didn't need to tell anyone to go out and say, "Fuck the draft," in order to insulate Mr. Cohen in exercising his *right* to say it.

> Finding District residents qualified to vote for Congress but not for the Maryland legislature, however, would turn Article I on its head. As we have noted, Article I, section 2 states that "the [congressional] Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. Const. art. I, § 2, cl. 1. Plaintiffs' enclave theory, by contrast, would permit residents of the District to vote in Maryland's congressional elections *notwithstanding that they lack* – even under an *Evans* theory – precisely those qualifications.

MO at 64. Note that *Adams' Complaint* recites, as elements of the case, that:

> 30. Today, the Plaintiffs are not apportioned to congressional districts, they do not vote for any member of Congress, they do not vote for any member of any state government, they do not govern the jurisdiction of their residences themselves, they are not insulated from intrusions of Congressional power in matters properly within the exclusive competence of state governments by virtue of the Tenth Amendment to the Constitution, but they are subjected to whatever laws Congress chooses to impose and they are taxed by Congress to pay for these actions.
>
> . . .
>
> 35. The District of Columbia, presently, is neither a sovereign State nor a part of a sovereign State.
>
> 36. The entire area of the District of Columbia or the entire area of the District of Columbia other than the area defined in the United States Code and in the District of Columbia Code as the "National Capital Service Area" could, as matters of law and fact, be admitted to the United States as a sovereign State or could be unified with an existing sovereign State.
>
> . . .
>
> 47. Today, as a direct result of the steps Congress took, the citizens of every federal enclave are members of the political communities of the various states in

which the federal enclaves are located.

48. Today, as a direct result of the steps Congress took, the citizens of every federal enclave are apportioned representation in Congress, resulting in the participation of the citizens who reside in the federal enclaves in all acts of Congress, through elected representatives.

Thus, *Adams bases* its equal protection claim upon the very facts which are found in the *Memorandum* to dispose of *Alexander*'s equal protection claim. District residents are not included in apportionments of congressional districts because they are not citizens of a State. They lack the "qualifications" (as the *Memorandum* terms it, MO at 64) required under Article I of the Constitution. *See Adams' Complaint* at ¶¶ 30 & 35. But the fact the enclave residents *are* "qualified" – *are* citizens of the States for the purposes of Article I of the Constitution – *is not* the result of lines "drawn by the Constitution itself," MO at 66; it is the result of specific actions taken by Congress. *Adams' Complaint* at ¶¶ 43-51; *Adams'* MSJ at 37-47. Congress, not the Constitution, ceded increments of Congress' power of "exclusive Legislation" to the States. Congress made a choice to do it for one category of people under this power and *not do it* for another – residents of the District of Columbia. So *Adams* doesn't "turn Article I on its head." MO at 64. *Adams* poses a question which takes Article I as an indicium of the status to which District residents are entitled and asks why, since Congress conferred it on all other people over whom Congress holds or ever held the power of "exclusive Legislation," Congress may continue to deny it to District residents.

Further, Plaintiffs in *Adams* distinguished themselves from Plaintiffs in *Alexander* by stressing that either unique, legislated status for the District which was proposed as a remedy in *Alexander* – including *Alexander*'s proposal that the court could order Congress to treat District residents as Maryland citizens for the purposes of election of congressional representatives only, a measure Congress has never used for any other population or group under any of its powers –

"would itself be an instance of the violations of right to equal protection of the laws asserted in Count One of the Complaint" in *Adams*. *Adams Opposing Consolidation* at 4. *Alexander*'s suggested relief was reiterated (surprisingly) by the Committee for the Capital City, *amicus curiae* (Feb. 8, 1999). In response to the Committee's position, *Adams* stated that,

> there is no known instance in which residents of a federal enclave are treated under law as anything less than full citizens of a State, for the exercise of all political rights such as voting for representation in Congress and in State governments. In other words, the "solution" proposed by the Committee (. . .) *has not* been imposed on the federal enclaves or on any other places subject to the exclusive jurisdiction of Congress. . . . There is no "Enclave Solution," short of *complete* political incorporation of the District of Columbia into the State of Maryland (retrocession).

Adams' Response to Committee for the Capital City (Apr. 1, 1999) at 3 (footnotes omitted). And the same or a very similar proposal was championed by eleven law professors, *amici curiae* (Feb. 26, 1999). In the conclusion to their response to the law professors, *Adams* Plaintiffs asked:

> One question reverberates after the Law Professors conclude their analysis of the status of the citizens of the District of Columbia: how does it serve fundamental principles of liberty and equality for an overwhelming majority to single out a discrete minority (which has traditionally been the subject of adverse discrimination) and craft a *unique* status for that minority to exercise an inferior grade of expression of one fundamental right, but which status segregates the minority from the majority and perpetuates violations of a plethora of other fundamental rights?

Adams' Response to Eleven Law Professors (Apr. 1, 1999) at 16 (citation omitted). Thus, the analysis in the *Memorandum* of *Alexander*'s demand for a unique, legislated status which might allow District residents to mimic a single action taken

by all other similarly-situated people on the basis of their status as citizens of States under Article I of the Constitution, MO at 64, addresses a remedy antipathetic to the claims presented in *Adams*.

Finally, in discussing *Alexander*'s enclaves argument and remedy, the *Memorandum* refers to a conflict between *Alexander*'s proposal and the holding of *Albaugh v. Tawes*, 233 F.Supp. 576 (D.Md. 1964), summarily affirmed by the Supreme Court, 379 U.S. 27 (1964). MO at 64-65. *Adams* addressed the relevance of *Albaugh* to *Adams*' claims and arguments, saying:

> All the claims and arguments made on behalf of [Plaintiffs] in *Adams v. Clinton* are entirely independent of (and do not depend upon or incorporate) any claims or arguments in *Albaugh v. Tawes*. In fact, the position of [*Adams* Plaintiffs] is that, precisely because of their residence in the District of Columbia, they are stripped of the status of being citizens of any State, and this position is an affirmative component of the Plaintiffs' claims and arguments in support of summary judgment for the Plaintiffs in *Adams v. Clinton*. In addition, the Plaintiffs in *Adams v. Clinton* have taken great pains to make it clear that they do not ask this Court to declare or craft a "retrocession" or reunification of the District of Columbia to Maryland. Therefore, even assuming this Court is bound by the Supreme Court's summary affirmance of *Albaugh*, all claims and arguments made by Plaintiffs in *Adams v. Clinton* remain intact.
>
> Insofar as *Albaugh* has any relevance to the claims or arguments in *Adams v. Clinton* (other than merely to recite the prevailing legal authority for the determination that the Plaintiffs are not citizens of Maryland), it is in *Albaugh*'s brief reference to arguments "based upon" the fact that residents of the District were allowed to vote in Maryland prior to 1801. [*Adams* Plaintiffs] discuss this period in their *Memorandum in Support of Summary Judgment* (at 18-22) and in their *Response to the Memorandum of Eleven Law Professors, Amici*

Curiae (at 6-15). The entire point of [*Adams*' Plaintiffs'] discussion of the period is best summarized, perhaps, in the latter document, where it was said that,

> despite holding the whole power of exclusive jurisdiction, intended to protect the national interests in securing a permanent Seat of the Federal Government, Congress did not see any need to exclude the residents of the District . . . from apportionment of representation in Congress while this Seat was being build under Congress' power.

This point seems to comport with – and certainly doesn't run against – the brief comments in *Albaugh* on the same period. Thus again, the claims and arguments in *Adams* are independent of the claims and arguments in *Albaugh*.

Adams on the Precedential Importance of Albaugh v. Tawes (Apr. 16, 1999) at 1-3 (citations omitted). Thus, the *Memorandum*'s statements on the relevance of *Albaugh*, MO at 64-65, actually support *Adams*' equal protection arguments.

All these statements in documents filed in *Adams* make it clear that *Adams* Plaintiffs did not share and would even have fought against *Alexander*'s "enclave theory," which "would permit residents of the District to vote in Maryland's congressional elections notwithstanding that they lack . . . precisely those qualifications" which the Supreme Court found in *Evans v. Comman* were required for such voting: *i.e.*, *State* citizenship. MO at 64. So, again, the analysis in the *Memorandum* of *Alexander*'s equal protection claim has no bearing on *Adams*' equal protection claim. Insofar as it comes close, the analysis in the *Memorandum* of *Alexander*'s equal protection claim *supports Adams*' equal protection claim.

Finally, the *Memorandum* offers an interesting theory regarding congressional treatment of the federal enclaves in footnote 52 of the *Memorandum*, where the *Memorandum* suggests a textual distinction between the enclaves and the District of Columbia.

Although the constitutional text indicates that Congress

> has "like Authority" over both the District and the enclaves, the text does refer to them differently. The District is described as being created by "Cession" of particular states, a word which indicates that thereafter the District would no longer be part of those states. Enclaves, on the other hand, are areas purchased with the consent of the legislature of the state "in which the Same shall be," which may explain why *Evans* viewed enclaves as remaining parts of the state from which they were created. We need not resolve the significance of this difference in constitutional language, however, because the difference in the way in which Congress has exercised its authority over enclaves and the District distinguishes this case from *Evans* in any event.

MO at 63 n.52. While there is a difference in the text of the Constitution dealing with the District and the enclaves, the difference in the text made no difference in legal status of the enclaves or the District. As the cases cited in *Adams' Memorandum in Support of Summary Judgment* (at 39-40) show, as the comprehensive report *Jurisdiction Over Federal Areas Within the States; Report of the Interdepartmental Committee for the Study of Jurisdiction over Federal Areas Within the States; Part I: The Facts and Committee Recommendation* (1956) (submitted in support of summary judgment) shows, and as the Department of Justice's own report, *Federal Legislative Jurisdiction; Report Prepared for Public Land Law Review Commission by the Land and Natural Resources Division* (1969) (*n.b.*, completed on the eve of *Comman v. Dawson*) shows, residents of federal enclaves were once deprived of all political rights *for the same reason* the residents of the District of Columbia are deprived of political rights: they were not citizens of any State. And as Dr. Bowling attested to the Court, Congress was given the same power over the enclaves as it has over the District for precisely the same reason as it has the power over the District. *Second Affidavit of Kenneth R. Bowling* (Exhibit W attached to *Adams'*

Reply to Clinton's Opposition) at ¶¶ 3 & 5.[24]

Also, as shown above, *Evans* did not assume that the federal enclaves had always been political parts of the States in which they were physically located. *Evans* recognized that the federal enclaves had once been extraterritorial to the States, but that sufficient political authority over the enclaves had been ceded to the States, such that the enclaves were (by 1970) political parts of the States. So when the *Memorandum* says that "the difference in the way in which Congress has exercised its authority over enclaves and the District distinguishes this case from *Evans* in any event[,]" the *Memorandum* can only be referring to *Alexander*, as "this case." Conversely, "the difference in the way in which Congress has exercised its authority over enclaves and the District" is at the heart of *Adams*; this "difference" is the trip wire for *Adams*' equal protection claim. To treat the "*difference*" as the answer to *Adams*' equal protection claim is to beg the question presented in *Adams*, which is whether there is any compelling and narrowly tailored governmental purpose *legitimating this* "*difference* in the way in which Congress has exercised its authority over enclaves and the District[.]"

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[24] It should also be noted that, insofar as a textual difference between the grant of power over the federal enclaves and over the District of Columbia is read into the Constitution, the real world facts of the enclaves and of the District augur for precisely the opposite result than the *status quo*. Now, residents of the District are under the plenary power of Congress, while residents of the enclaves are full citizens of the States. Yet many federal enclaves house national security operations and, to reside there, one must have a role in the function of these, the federal government's highest and most secret activities, *see Jurisdiction Over Federal Areas Within the States; Report of the Interdepartmental Committee for the Study of Jurisdiction over Federal Areas Within the States; Part I: The Facts and Committee Recommendation* (1956), while some of the Plaintiffs in *Adams* live in the District only because they were born here and none have anything of any importance to do with the federal government, *see* Affidavits of the Plaintiffs. So, *if* a textual distinction connecting power to federal purpose is to be drawn between the enclaves and the District in light of the real world facts of the situation, the distinction would have to mean residents of the enclaves would be the group under closest and most segregated scrutiny and control by Congress, not residents of the District.

Final Points on Equal Protection

Other passages in the analysis of "equal protection" in the *Memorandum* are accurate, in *Adams* estimation, though they do not address issues presented in *Adams*. For instance, the Court majority distinguishes its position from that of the dissenter on the suggestion that there is an equal protection comparison of District residents with "overseas voters." MO at 67 n.62. This suggestion was pursued by eleven law professors who appeared as friends of the court, ostensibly addressing the merits of both cases (Feb. 26, 1999). Since their argument that Congress should do for District residents what it did for "overseas voters" ran counter to the claims, arguments, and evidence presented in *Adams*, Plaintiffs in *Adams* filed a response making the same point made in footnote 62 of the *Memorandum*, that the Uniformed and Overseas Citizens Voting Rights Act, 42 U.S.C. § 1973ff-1, merely provides a uniform method of absentee voting for those *already qualified* to vote because they are citizens of States. *See Adams' Response to Eleven Law Professors* (Apr. 1, 1999) at 2-5.

Finally, before moving on to the Guarantee Clause Claim, the *Memorandum* provides its second, no less critically telling distinction between *Adams* and *Alexander* in another footnote in this Subpart (A) of the *Memorandum*. Note 63 on page 68 observes (correctly) that *Adams* raises challenges to "Congress' continued exercise of exclusive federal authority over the District" and, since the Court had previously decided to remand all claims not strictly concerning apportionment of congressional districts to a single district judge, MO at 38-40, the Court notes that this class of "challenge" will be so remanded. Interestingly, it is said that this category of claims in *Adams* "*does* challenge a species of legislative action[:] . . . Congress' decision to exercise exclusive authority over the District in local matters, yet to cede similar authority to the states in the federal enclaves, [which *Adams* says] violates equal protection." *Id.* (emphasis added).

By the plain terms of *Adams' Complaint* and *Motion for Summary Judgment*, however, and as evidenced throughout

Adams' submissions, if the facts of Congress' assertion of governmental power over the District is a "species of legislative action" susceptible to equal protection analysis in the context of local self-government, then Congress' assertion of governmental power over the District is a species of legislative action" susceptible to equal protection analysis in the context of apportionment of congressional districts.

So again, it appears that, when *Adams* was merged into *Alexander* and *Alexander*'s claim and arguments were mistakenly taken as somehow encompassing or representing *Adams*' claims and arguments (not to mention *Adams*' evidence), *Alexander*'s equal protection claim and arguments completely occluded *Adams*' equal protection claim, arguments, and evidence. Thus, having lost sight of the unique form and content of *Adams*' equal protection claim, there was no cognitive receptacle for *Adams* equal protection arguments or the evidence supporting those arguments. Thus, the *Memorandum* could correctly characterize *Adams* claims concerning local government of the District as a "species of legislative action" susceptible to equal protection analysis, yet ignore and not address the *other* "species of legislative action" at issue in *Adams* (the various legislative actions which resulted in conveyance of all similarly-situated places from exclusive congressional jurisdiction to state jurisdiction). But this being so, entry of judgment dismissing those claims, on the basis of analysis of antithetical claim and arguments presented in *Alexander*, denies due process of law to *Adams*' Plaintiffs.

Subpart D: the Guarantee Clause Claims

The discussion in the *Memorandum* of "Plaintiffs' final claim[,] based on the Republican Guarantee Clause of Article IV" opens by saying "[p]laintiffs argue that the guarantee of a republican form of government is incompatible with their exclusion from representation in Congress." MO at 71 (quoting *Alexander*'s *Memorandum in Support of Summary Judgment*). This "claim" is rejected in the *Memorandum* as not presenting a substantial federal question.

> While we cannot be certain precisely what the Framers thought constituted a "Republican Form of Government," we do know that they intended the District to be subject to the exclusive control of Congress, that they reserved the power to elect congressional representatives exclusively to those qualified to vote in state elections, and that District residents are not so qualified. Accordingly, we cannot adopt plaintiffs' Republican Guarantee argument without concluding that Article IV of the Constitution was intended to repeal the provisions of Article I. That, of course, we cannot do.

MO at 71 (citations omitted). This analysis is not necessarily or reasonably dispositive of the Guarantee Clause claim made in *Adams*.

First, the claim made in *Adams* is presented in light of the facts placed at issue more extensively in *Adams*' equal protection claim: that the present District of Columbia has been treated differently that other, similarly-situated places. In their *Memorandum in Support of Summary Judgment*, Plaintiffs in *Adams* stated:

> Congress arrogates to itself all power to control the District of Columbia and its local governance. Since Congress is not comprised of members elected by the citizens so ruled, Congress is *not* a republican form of government. The citizens subjected to these actions and institutions do not participate to any extent, themselves or through their representatives, in taking these actions or framing these institutions. Congress ignores its obligation to insure that the citizens of the District have a republican form of government and Congress *obstructs* erection of truly republican forms of government in the District of Columbia, traducing the ideals for which the Guarantee Clause stands.

Adams' MSJ at 73-74 (footnotes and citations omitted). These statements were fleshed out further in response to the various Defendants' arguments in opposition to summary judgment.

> [The House Officers] challenge . . . Plaintiffs' . . .

argument that the term "State" in the Guarantee Clause should be read to apply to the District because other Clauses in Article IV which the term "State" appears apply to the District. The Defendants' characterization ... provokes the question whether Congress violates the rights of the citizens of the District to the equal protection of the laws because Congress selectively applies the Clauses of the Constitution to the District, to the detriment of the citizens.

Essentially, the only inherent difference between the Plaintiffs' [argument] . . . and the Defendants' [argument] ... turns on the question whether the cases involve the various Clauses in Article IV at least in part of their own force or only by Congressional indulgence. Plaintiffs argue from the former understanding; the Defendants argue from the latter. But even if the Defendants are correct in their reading, then Congress violates the Plaintiffs' rights by selecting which Clauses of Article IV to bring to bear on (or to the benefit of) the District. ...

. . . [T]he theory underlying the Defendants' *Opposition*–that the Clauses of Article IV have been "applied" to the District of Columbia only by virtue of *legislative indulgence*–hangs on *a choice made by Congress* to extend the benefits of the Full Faith and Credit Clause or the Privileges and Immunities Clause to the citizens of the District, and *a choice made by Congress* to not extend the benefits of the Guarantee Clause to the District. In other words, the [Defendants'] theory necessarily begs the broader question implied in Count One of the Complaint whether Congress doesn't violate the rights of the citizens of the District by continually segregating them from the remainder of the United States, picking and choosing which Clauses of the Constitution "apply" here (according to whether they threaten to deprive Congress of its plaything). Thus, the Defendants' argument in opposition to the Plaintiffs' claims under Count Two of the Complaint

merely makes Count Two of the Complaint an instance when Congress violates the Plaintiffs rights to equal protection of the laws. This may make Count Two a significant "subset" of Count One, but it doesn't vitiate it.

Adams' Reply to House Officers' Opposition (Mar. 8, 1999) at 13-14 (citations omitted; all emphasis in original). Likewise:

> Congress could have treated the citizens of the District of Columbia in a manner similar to that in which it has treated all other citizens who have been subject to *identical* powers of Congress under the Constitution, but it has not. . . . Rather, Congress has chosen to perpetuate the *status quo*, to keep the District of Columbia as a colony under its absolute sovereign power, which means Congress has to administer this colony.
>
> Thus, Congress' *failures to act* are not the sole issues in this case, because Congress cannot maintain the *status quo* by *inaction* alone. To maintain and perpetuate the *status quo*, Congress must actually *do* many things. Thus, this case also involves overt actions Congress has taken to administer the District, to perpetuate and maintain the *status quo*, infringing the rights of the Plaintiffs.
>
> Creation of the Control Board is one such "action," and the Board's actions administering the District perpetuate the District's dependent status, which leads to violation of the Plaintiffs' rights. Every overt "action" of the Control Board perpetuates and maintains Congressional control of the places where these Plaintiffs live and work. The Control Board, in other words, is an overt expression of Congress' choice to maintain the District as a colony. The Control Board is part of the "fence" Congress uses to continue to fence the residents of the District of Columbia out of apportionments, *see Carrington v. Rash*, 380 U.S. 89, 94 (1965), out of full citizenship.
>
> . . . [T]he Control Board was intentionally imposed

on the District of Columbia as an *alternative* to other action which would have resulted in respect for the rights of full citizenship which are at issue in this case; that alternative was "retrocession" of the District to Maryland. Another alternative would have been admission as a state, although Congress did not consider it; and yet another alternative would have been conversion of the entire District of Columbia into a non-residential national park. While this case is not about the alternative merits of these alternatives, it *is* about Congress' choice to perpetuate the dependent, colonial status of the District of Columbia, with the result that the citizens of the District are stripped of a plethora of basic rights of citizenship. The Control Board was created to facilitate continued Congressional control of the District, which is to perpetuate the status of the District. The Control Board allows Congress to avoid dealing with the larger problems, allows Congress to keep the District of Columbia as a sort of colony, allows Congress to continue to deny full citizenship to the residents of the District.

Adams' Reply to the Control Board's Opposition (Mar. 8, 1999) at 6-8 (footnotes and other citations omitted).

In short, *Adams'* Guarantee Clause claim should be read in light of Congress' overt expressions of respect for the Clause with regard to all other, similarly-situated places. As Congress has dealt with others under its power of exclusive Legislation, so must Congress deal with the people of the District of Columbia. This is confirmed by the fact that the very same "intent" attributed in the *Memorandum* to the founding of the District ("they intended the District to be subject to the exclusive control of Congress [and] they reserved the power to elect congressional representatives exclusively to those qualified to vote in state elections, and . . . District residents are not so qualified[,]" MO at 71) must be attributed to the founding of the former portion of the District south-west of the Potomac River (Alexander County) and to the federal enclaves. *See* Second Affidavit of Kenneth R. Bowling,

attached to *Adams' Reply to Clinton's Opposition* (Mar. 8, 1999). So the reference to "original intent" in the *Memorandum*, MO at 71, cannot dispose of *Adams'* Guarantee Clause claim, for the *same* "original intent" goes to a very large number of other places where Congress *heeds* the Guarantee Clause, while it continues to flaunt it in the District of Columbia. Clearly, "original intent" allows room for Congress to heed the Guarantee Clause for all those other places, so the question becomes: why doesn't the *same* latitude or demand for expression of original intent *also* apply to the District? In this sense, *Adams'* Guarantee Clause indicates the "direction" Congress should go in remedying *Adams'* Equal Protection claim, to treat the residents of the District and residents of all similarly situated places substantially identically (*see Heckler, supra*, 465 U.S. at 740 & n.8).

The *Memorandum* also discusses the Guarantee Clause "claim" (singular) as one which would require the "conclu[sion] that Article IV of the Constitution was intended to repeal the provisions of Article I[.]" MO at 71. This statement is not a tautology or rhetorical palindrome if and only if the *Memorandum* is addressing the claim made in *Alexander*. Recall that the central claim in *Alexander* is based on the assumption that Congress' power under the District Clause is so great that Congress can constructively amend those portions of Article I which define the sources of representation in Congress to provide something akin to "representation" to the residents of the District of Columbia. *See supra* at 33-35. Thus, since *Alexander*'s Guarantee Clause "argument" is an *additional* argument to this same end, *see* MO at 65, to the effect that Congress can and should heed the mandates of the Guarantee Clause by so amending (or repealing) the terms of Article I, the *Memorandum* is logically rebutting *Alexander*'s Guarantee Clause "argument" when it says, flatly, that Article IV *does not* repeal or amend the representation provisions of Article I, which *Alexander* had argued *could be* constructively amended (if not repealed) by simple legislation or order of the courts.

But placed in the context of *Adams*' Guarantee Clause claim (*i.e.*, stripped of the premises underlying invocation of the Clause in *Alexander*), the statement in the *Memorandum* is a tautology or rhetorical palindrome which reads the same back-to-front as front-to-back. Just as Article IV of the Constitution was not "intended to repeal the provisions" of Article I, Article I of the Constitution was not "intended to repeal the provisions" of Article IV. More specifically, Article IV doesn't repeal the District Clause (art. I, § 8, cl. 17) *and* the District Clause doesn't repeal Article IV. From the point of view of *Adams*, Congress can do whatever it wants under the District Clause, *until and unless* Congress violates other provisions of the Constitution, at which point Congress must back off and find a way to accommodate the rights and mandates found elsewhere in the Constitution. *See* cases cited in n. 11, *supra*. This argument neither repeals nor amends the District Clause; it merely restrains Congress' exercise of powers *under* the District Clause, just as the courts have restrained Congress in exercise of powers under other clauses of the Constitution.

Thus, the consideration of a Guarantee Clause claim in the *Memorandum* addresses the claim and arguments presented in *Alexander* directly, albeit without addressing or disposing of the claims or arguments presented in *Adams*. Thus, entry of judgment on *Adams* Guarantee Clause claims on the basis of analysis of *Alexander*'s Guarantee Clause arguments denies due process of law to *Adams*' Plaintiffs.

Subparts B, C, and E

In Subparts B, C, and E to Part V of the *Memorandum*, additional arguments presented by the Plaintiffs in *Alexander* are addressed, but these arguments are alien and irrelevant to the claims and arguments presented in *Adams*. For instance, *Adams* makes no claim that apportionments of congressional districts are unconstitutional because they violate due process of law, such as is suggested and addressed in the *Memorandum*, MO at 70-71. Likewise, *Adams* makes no "harmonization" claim, MO at 71-72. And *Adams* does not

make a "privileges and immunities of national citizenship" claim, MO at 68-70; rather, *Adams* specifically stated that "[t]he right to vote for members of Congress is an attribute of citizenship *in a State*[,]" *Adams' Response to Paul Strauss, Amicus Curiae* (Apr. 1, 1999) at 1-2 (citations omitted), so this particular "argument" is even antithetical to the arguments in *Adams*. Thus, Subparts B, C, and E of Part V of the *Memorandum* either are irrelevant or support the claims and arguments presented in *Adams*.

Part Six: a Conclusion

Part VI of the *Memorandum* presents no points dispositive one way or the other, since it is a "conclusion," summing up the gist of the preceding portions of the *Memorandum*, but one statement in this "conclusion" is relevant to understanding the essential and polar differences between *Adams* and *Alexander*. After a clear indication that the Court was sympathetic to the "inequity" of the situation, the *Memorandum* states the following, global summary and conclusion: "longstanding judicial precedent, as well as the Constitution's text and history, persuade us that this court lacks authority to grant plaintiffs the relief they seek. If they are to obtain it, they must plead their cause in other venues." MO at 72. To understand fully the limits of these statements as they might bear on *Adams*, we resort again to the particulars of each case.

In *Adams* – with specific focus on affirmative relief *beyond* declaratory judgements and limited to relief germane to Plaintiffs' claims which the Three-judge Court did not remand to a single judge and couched in light of the key or fundamental arguments supporting such relief – Plaintiffs demanded mandatory and perpetual injunctions that the Federal Defendants[25] not "transmit," "certify," "enroll," or "admit" any representatives under an apportionment of congressional districts which apportionment *includes* the residents of the former portion of the District South-west of

[25] The "Federal Defendants" in *Adams* were the President, the Clerk of the House of Representatives, and the Sergeant at Arms of the House.

the Potomac River, of the federal enclaves, and/or of the continental territories, and which *excludes* the residents of the present District of Columbia. *Adams' Complaint* at 25-28 (relief provisions C.1b, 2a, 2b, and 3). Of course, the *reason Adams* Plaintiffs believe this necessary is that such present apportionments violate (most importantly) their rights to the equal protection of the laws. *Id.* at ¶¶ 1-87.

In *Alexander* – with specific focus on affirmative relief *beyond* declaratory judgements and limited to relief germane to Plaintiffs' claims which the Three-judge Court did not remand to a single judge and couched in light of the key or fundamental arguments supporting such relief – Plaintiffs demanded injunctions ordering the Federal Defendants[26] "to account for citizens of the District of Columbia" in "reporting," "transmitting," and "determining" voting members of the House of Representatives by treating the District as a state or as part of the State of Maryland for the purposes of Article I of the Constitution. *Alexander's First Amended Complaint* at 59-60 (relief provisions 4.a, b, and c). The reason *Alexander* Plaintiffs believed this was necessary was that such prospective action was necessary to vindicate their fundamental right to vote. *Id* at 58-59 (relief provision 3, giving Congress time, before entry of the mandates against the Federal Defendants, "to fashion a constitutional remedy that will vindicate the constitutional rights of citizens of the District of Columbia to vote for members of the United States Congress.").

Much of the differences between these two pleas has already been discussed above, so we needn't revisit all the earlier discussions, but limit ourselves to consideration of these two pleas in light of the suggestion in the *Memorandum* that the court "lacks authority to grant plaintiffs the relief they seek" and the suggestion that, "*[i]f* they are to obtain it, they

[26] The "Federal Defendants" in *Alexander* were the Secretary of Commerce, the Clerk and the Sergeant-at-Arms and the Chief Administrative Officer of the House of Representatives, as well as the Secretary of the Senate and the Sergeant-at-Arms of the Senate. The claims concerning the last two, however, were remanded by the Three-judge District Court to a single judge, so were not involved in the claims which were adjudicated by the Three-judge District Court.

must plead their cause in other venues." MO at 72 (emphasis added). As to the first statement, the Court provided more than adequate reasoning supporting the conclusion that the courts cannot order any federal officials or functionaries to "treat the District as a state" or to "treat the District as part of Maryland" for purposes of executing or carrying out a function prescribed or defined in the Constitution, but no passage in the *Memorandum* explains why a court cannot order a federal official or functionary *to not do something* which violates or reflects the violation of constitutional guarantees of equal treatment.

The proposition that the courts lack authority to enjoin violation of the equal protection provisions of the Constitution returns this country to its earliest days, *before* there was specific reference to "equal protection" as such. Absent the courts' authority to issue preventive or prohibitory injunctions or take other action amounting to orders "to cease and desist" to enforce mandates of equal protection, how long would women be excluded outright from public universities? *see United States v. Virginia*, 518 U.S. 515 (June 26, 1996); how long would homosexuals be targets of legal discrimination? *see Romer v. Evans*, 517 U.S. 620 (May 20, 1996); how long would people receive different public benefits merely because of their sex? *see Orr v. Orr*, 440 U.S. 268 (1979); how long would people of different races be prevented from marrying? *see Loving v. Virginia*, 388 U.S. 1 (1967); how long would outright racial segregation in schooling continue? *see Brown v. Board of Education*, 347 U.S. 483 (1954); how long would habitual shoplifters be sterilized while habitual embezzlers proliferate? *see Skinner v. Oklahoma*, 316 U.S. 535 (1942); and how long would Asian-Americans be fair targets for selective prosecution? *see Yick Wo v. Hopkins*, 118 U.S. 356 (1886); not to mention: how long would the power or voice of some populations be inferior to the power or voice of others in electing governments? *see Dunn v. Blumstein*, 405 U.S. 330 (1972), *Baker v. Carr*, 369 U.S. 186 (1962), and *Reynolds v. Sims*, 377 U.S. 533, 565 (1954).

In light of the actual demands in each case for affirmative

relief, the suggestion in the *Memorandum* that, "*if*" plaintiffs are to obtain the relief they seek, "they must plead their cause in other venues," MO at 72 (emphasis added), diverges more radically as it is applied to each case. While it's not clear what the conditional "if" might have been intended to mean with regard to the aims sought in *Alexander*, for the overall result of the apparently comprehensive analysis throughout the *Memorandum* would seem to mean not only that the *courts* cannot order the defendants to do what *Alexander*'s Plaintiffs wanted, but that no other Branch of the federal government could make the District into a "nominal state," *see* Peter Raven-Hansen, *Congressional Representation for the District of Columbia: A Constitutional Analysis*, 12 Harv. J. Legis. 167 (1975), "for the purposes of" Article I of the Constitution, either.

But when this concluding comment is applied to the aims sought in *Adams*, it produces the startling suggestion that the Plaintiffs are thrust back into the same forum which has treated them disparately as compared to all other, similarly-situated people. But it's too late in the day of American constitutional jurisprudence to wonder *whether* plaintiffs have a judicial remedy for disparate treatment in violation of the Constitution, much less to leave them no recourse but to the very agency of government most responsible for the disparate treatment at issue in the case.

The Opinion in Dissent

The Honorable Louis F. Oberdorfer dissented from his colleagues on the Three-judge District Court, but his memorandum opinion, reported at 90 F.Supp.2d 72-107, is wholly concerned with the claims and arguments presented in *Alexander*[27] and Judge Oberdorfer makes only a couple

[27] – saying, for instance, "the defendants have failed to persuade me that it is necessary for the Secretary to exclude the people of the District from apportionment and thus interfere with their voting for a Member of the House of Representatives." 90 F.Supp.2d at 82. Since *Adams* Plaintiffs disagree with the claims and arguments presented in *Alexander* as matters of constitutional law, they are also in the politically unfortunate position of having to disagree with those claims and arguments as they are affirmed in Judge Oberdorfer's dissenting opinion. Nevertheless, the Plaintiffs thank Judge Oberdorfer for his forthright and aggressive

procedural references to *Adams*. Substantively, the dissent cannot be taken to either support nor contravene, in any dispositive way or degree, the claims or arguments presented in *Adams*, at least in ways which are not discussed in detail above.

CONCLUSION

This Analysis makes several points clear. First, howsoever accurately the *Memorandum Opinion* treats the claims and arguments made in *Alexander v. Daley*,[28] that treatment of *Alexander*'s claims and arguments doesn't touch or bear upon the claims, arguments, or evidence presented in *Adams v. Clinton*. Second, insofar as the *Memorandum* mentions *Adams*, the *Memorandum* treats *Adams* as a reflection of *Alexander*, which distorts the actual claims and arguments presented in *Adams* to make them fit the Procrustean bed of antithetical claims and arguments presented in *Alexander*. Taken together, these points mean that the Court's decisions to dismiss claims made by Plaintiffs in both *Adams* and *Alexander* could only have been based upon analysis of the antithetical claims and arguments presented in *Alexander* alone. In other words, when the Court dismissed the claims presented by Plaintiffs in *Adams v. Clinton*, the Court did so without any showing of the legal reasons for it, and the reasons given, necessarily, have no logically dispositive relation to or impact upon the claims presented in *Adams*.

Prepared by George S. LaRoche

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statement on behalf of their rights.

[28] It bears repeating that no component of this *Analysis* should be taken to suggest that the treatment in the *Memorandum* of the claims and arguments in *Alexander* is erroneous or deficient *in light of* or within the ambit of the specific claims or arguments (or evidence or lack thereof) presented in *Alexander*.

Supreme Court, U.S.
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No. 01-1519

In the Supreme Court of the United States

LOIS E. ADAMS, ET AL., PETITIONERS

v.

GEORGE W. BUSH, PRESIDENT OF THE UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PRESIDENT OF THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

This Court previously affirmed the judgment of a three-judge district court dismissing petitioners' claims that Congress is required either to grant statehood to the District of Columbia or to retrocede the District to Maryland. *Adams* v. *Clinton*, 531 U.S. 941 (2000). The questions presented are:

1. Whether this Court has exclusive jurisdiction to review the denial of petitioners' motion for relief from the judgment of the three-judge district court.

2. Whether the court of appeals abused its discretion in declining to transfer the case to this Court under 28 U.S.C. 1631.

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BRIEF FOR THE PRESIDENT OF THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. A1-A2) is unreported. The memorandum and order of the three-judge district court denying the motion under Federal Rule of Civil Procedure 60(b) (Pet. App. B1-B4) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 18, 2001. A petition for rehearing was denied on January 10, 2002 (Pet. App. C1-C2). The petition for a writ of certiorari was filed on April 10, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In June 1998, petitioners—a group of residents of the District of Columbia—commenced this action against the President of the United States, the Clerk and Sergeant-at-Arms of the House of Representatives, and the District of Columbia Financial Responsibility and Management Assistance Authority (Control Board). See Pet. App. E3-E4. Petitioners alleged that the equal protection component of the Fifth Amendment requires Congress either to grant statehood to the District of Columbia or to retrocede it to an existing State. See *id.* at E22, E24-E28. Petitioners also alleged that their lack of congressional representation and the absence of "a state government, insulated from Congressional interference in matters" of local concern, violates the Guarantee Clause of Article IV, Section 4. See Pet. App. E17.

Petitioners requested a judgment declaring that: (1) they have the right to congressional representation and to be included within a congressional apportionment; (2) they have a right to a state government insulated from congressional interference; (3) Congress's failure to ensure that the District is apportioned Representatives is unconstitutional; and (4) the imposition by Congress of the Control Board and all other actions uniquely applicable to the District are unconstitutional. See Pet. App. E22-E24. Petitioners also requested injunctions that would remain in effect until the portion of the District that falls outside the "National Capital Service Area" is admitted as a State or becomes part of an existing State.[1] The requested injunctions would: (1) prohibit

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[1] The National Capital Service Area includes "the principal Federal monuments, the White House, the Capitol Building, the United States Supreme Court Building, and the Federal executive,

the President from approving, implementing, or enforcing any congressional action applicable solely to the District (unless that action had been ratified by the citizens of the District or their elected representatives); (2) require the President to transmit to Congress an apportionment of one Representative for each State (or no apportionment at all); (3) require the defendant House Officers to certify, enroll, and admit to the House floor at most one Representative for each State; and (4) require the Control Board to cease operations. See *id.* at E24-E28.

2. The district court consolidated this case with *Alexander* v. *Daley*, No. 98-CV-2187 (D.D.C. filed Sept. 14, 1998), a separate suit by the District of Columbia and various District residents alleging, *inter alia*, that the District should be treated as a "State" under Article I of the Constitution and that its residents are therefore entitled to representation in both the House of Representatives and the Senate. Order of Nov. 3, 1998 (Dist. Ct. Docket Entry 42). The district court determined that the consolidated cases should be heard by a three-judge district court under 28 U.S.C. 2284(a), which requires that a three-judge court pass on claims "challenging the constitutionality of the apportionment of congressional districts." 26 F. Supp. 2d 156, 157 (D.D.C. 1998).

On March 20, 2000, the three-judge court dismissed petitioners' claims insofar as they relate to the apportionment of Representatives. 90 F. Supp. 2d 35 (D.D.C.) (three-judge court), aff'd, 531 U.S. 941 (2000). The court held that petitioners have presented a justici-

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legislative, and judicial office buildings located adjacent to the Mall and the Capitol Building," and the immediately surrounding streets. See 40 U.S.C. 136(a), (f), and (g).

able case or controversy and that they have standing to pursue their claims. 90 F. Supp. 2d at 40-45. However, the court, with Judge Oberdorfer dissenting, rejected petitioners' claims on the merits. *Id.* at 45-107.

The three-judge court remanded to the single-judge court all issues not relating to apportionment—*i.e.*, all claims in the case relating to the governance of the District, rather than the right to vote for Members of the House of Representatives. 90 F. Supp. 2d at 38-39, 68 n.63. The single-judge court rejected all of those remaining claims. 90 F. Supp. 2d 27 (D.D.C. 2000). Petitioners appealed that ruling to the United States Court of Appeals for the District of Columbia Circuit (No. 00-5239, filed June 30, 2000), and that appeal remains pending.

3. Petitioners appealed the three-judge district court's dismissal of their apportionment-related claims to this Court. In their jurisdictional statement, petitioners argued, among other things, that their "rights to the due process of law were violated when the court below entered judgment on their case without addressing their unique claims, arguments, and evidence, instead basing its judgment on analysis of claims and arguments presented in" the consolidated *Alexander* case. 00-97 J.S. at i; see *id.* at 14-19, 30.

The Solicitor General filed a motion to dismiss or affirm on behalf of the President, in which the Solicitor General argued that the appeal should be dismissed for lack of jurisdiction because (1) the three-judge district court lacked jurisdiction under 28 U.S.C. 2284(a), and (2) petitioners lacked standing. See 00-97 Mot. to Dismiss or Affirm at 9-17. Alternatively, the Solicitor General argued that the judgment of the three-judge district court should be affirmed on the merits. See *id.* at 17-25.

This Court summarily affirmed the district court's judgment. *Adams* v. *Clinton*, 531 U.S. 941 (2000). Justice Stevens would have dismissed the appeal. *Ibid.*

4. Petitioners filed a petition for rehearing in which they again argued that they had been denied due process of law by the three-judge district court because the consolidation of their case with *Alexander* led the district court to ignore their claims. See 00-97 Appellants' Pet. to Rehear at 1-10. This Court denied the petition for rehearing. *Adams* v. *Clinton*, 531 U.S. 1045 (2000).

5. Petitioners then returned to the three-judge district court and filed a motion under Federal Rule of Civil Procedure 60(b) in which they sought reconsideration of that court's dismissal of their claims. As the basis for that motion, petitioners advanced the same due process argument that they had raised in both their jurisdictional statement and their petition for rehearing by this Court. See Pet. App. I2 (arguing that the three-judge "Court's analysis does not address the claims actually made in *Adams*").

6. The three-judge district court denied the Rule 60(b) motion, Pet. App. B3, and petitioners appealed that denial to the court of appeals. The court of appeals dismissed the appeal for lack of jurisdiction in a brief unpublished order. *Id.* at A1-A2.

ARGUMENT

The unpublished decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. This Court's review is therefore not warranted.

1. Petitioners' contention (Pet. 9-19) that the court of appeals had jurisdiction under 28 U.S.C. 1291 lacks merit. Section 1291 withholds jurisdiction from the

courts of appeals over appeals from "final decisions * * * where a direct review may be had in the Supreme Court." 28 U.S.C. 1291. Direct review of the denial by the three-judge court of petitioners' motion under Federal Rule of Civil Procedure 60(b) was available in this Court under 28 U.S.C. 1253. That statute authorizes an appeal to this Court "from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." 28 U.S.C. 1253. The denial of petitioners' Rule 60(b) motion was such an order because it reaffirmed the three-judge court's earlier denial of all relief to petitioners, including the injunctive relief that petitioners had requested in their complaint.

Petitioners do not dispute that this case is a civil action required by Act of Congress (28 U.S.C. 2284(a)) to be heard and determined by a three-judge district court. See Pet. 9, 10.[2] Nonetheless, petitioners contend

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[2] In its motion to dismiss or affirm petitioners' prior direct appeal, the government argued that petitioners' direct appeal should be dismissed because 28 U.S.C. 2284(a) did not give the district court jurisdiction over petitioners' equal protection claim. Instead of dismissing the appeal for lack of jurisdiction, however, this Court affirmed the judgment of the three-judge court on the merits. See *Adams* v. *Clinton*, 531 U.S. 941 (2000). That determination by this Court that the three-judge district court was properly convened under Section 2284(a) "settles the issue[] for the parties." *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977) (per curiam) (quoting *Fusari* v. *Steinberg*, 419 U.S. 379, 391-392 (1975) (Burger, C.J. concurring)). See *ibid.* ("Summary affirmances * * * without doubt reject the specific challenges presented in the statement of jurisdiction and * * * prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions.").

(Pet. 10-12) that the order denying their Rule 60(b) motion did not "deny[] an interlocutory or permanent injunction" (28 U.S.C. 1253) and that direct review of the order in this Court was therefore not available.[3]

This Court has already rejected similar arguments. In *Lynch* v. *Household Finance Corp.*, 405 U.S. 538 (1972), the Court exercised jurisdiction under Section 1253 over a direct appeal from the order of a three-judge district court dismissing (on jurisdictional grounds) a complaint that sought injunctive relief. The appellees in *Lynch* argued that "since the three-judge court never considered whether an injunction should be granted an appeal should lie to the Court of Appeals." *Id.* at 541 n.5. This Court rejected that argument and held that this Court had jurisdiction because the three-judge court "entered a judgment 'denying all relief sought by plaintiffs.'" *Ibid.*

Consistent with *Lynch*, the Court has repeatedly exercised jurisdiction under Section 1253 to review orders of three-judge district courts that terminate

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[3] Petitioners also contend (Pet. 10) that this Court lacks jurisdiction under Section 1253 over their appeal from the denial of the Rule 60(b) motion because there was no "hearing" in the district court. 28 U.S.C. 1253. Although there was no evidentiary hearing or oral argument on petitioners' motion, petitioners received a "hearing" from the district court based on their written submissions. Cf. *United States* v. *Florida E. Coast Ry.*, 410 U.S. 224, 240 (1973) (the term "hearing" need not encompass an evidentiary hearing or the right to present oral argument). Petitioners cite no authority for the counter-intuitive proposition that this Court's jurisdiction under Section 1253 turns on whether a district court conducts an oral hearing in the course of granting or denying injunctive relief. Furthermore, the district court did conduct an oral hearing before entering the judgment from which petitioners sought relief and which the district court reaffirmed in its order denying petitioners' motion under Rule 60(b).

litigation in which injunctive relief was requested. See, *e.g.*, *Shaw* v. *Reno*, 509 U.S. 630 (1993); *Brown* v. *Thompson*, 462 U.S. 835 (1983); *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425 (1977); *Carter* v. *Stanton*, 405 U.S. 669, 670-671 (1972).[4] Indeed, that is precisely what the Court did earlier in this case when it affirmed the three-judge district court's dismissal of petitioners' apportionment-related claims. See *Adams* v. *Clinton*, 531 U.S. 941 (2000). Petitioners agree that this Court properly exercised jurisdiction over that appeal. See Pet. 4, 9, 10, 16. For the same reasons that this Court had jurisdiction over that appeal, this Court—and not the court of appeals—also had jurisdiction over the appeal from the denial of petitioners' Rule 60(b) motion.

Like the initial judgment of the three-judge court dismissing petitioners' claims, the denial of petitioners' Rule 60(b) motion constitutes the denial of an injunction for purposes of Section 1253. The denial of the Rule 60(b) motion, like the original dismissal itself, is a final order that prevents any further adjudication of petitioners' claims for injunctive relief.

Moreover, petitioners' Rule 60(b) motion is directly tied to the merits of the claims presented in their direct

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[4] See also *Lefkovits* v. *State Bd. of Elections*, 424 U.S. 901 (1976), aff'g 400 F. Supp. 1005 (N.D. Ill. 1975) (three-judge court); *Fincher* v. *Scott*, 411 U.S. 961 (1973), aff'g 352 F. Supp. 117 (M.D. N.C. 1972) (three-judge court); *Beacham* v. *Braterman*, 396 U.S. 12 (1969), aff'g 300 F. Supp. 182 (S.D. Fla. 1969) (three-judge court); *Sullivan* v. *Alabama State Bar*, 394 U.S. 812 (1969), aff'g 295 F. Supp. 1216 (M.D. Ala. 1969) (three-judge court); *Oldroyd* v. *Kugler*, 461 F.2d 535, 539 (3d Cir. 1972) (dismissal of suit seeking injunctive relief by three-judge district court is appealable to the Supreme Court under 28 U.S.C. 1253); *Shames* v. *Nebraska*, 323 F. Supp. 1321, 1336 & n.22 (D. Neb. 1971) (three- judge court), aff'd, 408 U.S. 901 (1972).

appeal. The essential contention of the Rule 60(b) motion is that the three-judge court erred in entering its original judgment dismissing petitioners' claims for injunctive relief. There is no indication that Congress intended to confer jurisdiction over such interrelated appeals on different courts. Cf. *Wilson* v. *Edelman*, 542 F.2d 1260, 1281 (7th Cir. 1976) (allowing simultaneous appeals to court of appeals and Supreme Court for the purpose of adjudicating identical constitutional issues would "defy all notions of judicial economy and render the three-judge court statutory scheme unmanageable").

Petitioners contend (Pet. 12-19) that the issue in their Rule 60(b) motion (whether the district court violated their due process rights by dismissing their claims without addressing or analyzing them) is different from the question raised by their underlying claims (whether the fact that District of Columbia residents are not represented in Congress is a denial of equal protection). The argument made in the Rule 60(b) motion, however, was expressly presented to this Court on the prior appeal in both petitioners' jurisdictional statement and their petition for rehearing. See 00-97 J.S. at i, 14-19, 30; 00-97 Pet. to Rehear at 1-10.

2. Petitioners' contention (Pet. 19-20) that the court of appeals erred in refusing to transfer their appeal from the denial of their Rule 60(b) motion to this Court also lacks merit. A transfer is appropriate only if it is "in the interest of justice." 28 U.S.C. 1631. As noted above, petitioners have already twice presented to this Court the argument made in their Rule 60(b) motion—once in their jurisdictional statement and again as the exclusive argument in their petition for rehearing. It would not be in the interest of justice to provide peti-

tioners a third opportunity to present that argument to this Court.[5]

As the Seventh Circuit has explained:

> A court is authorized to consider the consequences of transfer before deciding whether to transfer; that is implicit in the statute's grant of authority to make such a decision * * * and implies in turn that the court can take a peek at the merits, since whether or not the suit has any possible merit bears significantly on whether the court should transfer or dismiss it.

Phillips v. *Seiter*, 173 F.3d 609, 610-611 (7th Cir. 1999) (Posner, C.J.) (citation omitted); accord *Campbell* v. *Office of Pers. Mgmt.*, 694 F.2d 305, 309 n.6 (3d Cir. 1982) (refusing to transfer appeal where the petitioner "could not prevail" on the merits). As the government explained in its motion to dismiss or affirm petitioners' direct appeal, petitioners lack standing to seek the relief that they have requested (see 00-97 Mot. to Dismiss or Affirm at 13-17)[6] and their equal protection and Guarantee Clause claims plainly lack merit (see *id.* at 9 n.4, 17-25). This case does not warrant this Court's further attention.

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[5] Cf. *In re Dep't of Energy Stripper Well Litig.*, 206 F.3d 1345, 1354 (10th Cir.) (transfer to Federal Circuit not in the interest of justice where Federal Circuit had referred disapprovingly to such a transfer in dismissing with prejudice earlier appeals filed by appellants in the same case), cert. denied, 531 U.S. 924 (2000).

[6] For the reasons stated in footnote 11 of the government's motion to dismiss or affirm, the injunction that petitioners seek against the President is beyond the power of the courts to issue because the courts cannot enjoin the President to perform a non-ministerial task.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 01-1519

IN THE
Supreme Court of the United States

LOIS E. ADAMS, *ET AL.*,
Petitioners,

v.

GEORGE W. BUSH, *ET AL.*
Respondents

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

PETITIONERS' REPLY TO OPPOSITION OF RESPONDENT PRESIDENT BUSH

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SUMMARY OF REPLY

Respondent's Opposition to the Petition for Writ of Certiorari shows that the Writ should be granted; the Court may then summarily reverse and remand this case for reinstatement of Petitioners' appeal in the court below.

REPLY TO STATEMENT [OF FACTS]

Respondent proffers two erroneous and unsubstantiated "facts" of this case, which will be addressed in Petitioners' reply to Respondent's arguments.

REPLY TO RESPONDENT'S ARGUMENTS

Regarding Question One:

Respondent's argument on the primary question at issue–as to *which* court has jurisdiction over the appeal underlying this Petition for Writ of Certiorari ("Pet." at i)–is found on pages 7-9 of his Opposition ("Opp."). His argument, generally, is that the three-judge district court's denial of Petitioners' motion for relief under Federal Rule of Civil Procedure 60(b) (Appendix ("App.") B) was a "denial of an injunction" under 28 U.S.C. § 1253, so appeal from that decision is to this Court and not to the court of appeals.

Respondent never provides any compelling analysis or illustration of the *factual* component of the assertion, however, showing that denial of Petitioners' Rule 60(b) motion was necessarily also denial of an injunction. At most, he asserts that it "reaffirmed" the earlier denial of all relief (Opp. at 6). This is a highly abstract correlation, because the issue before the court in the Rule 60(b) motion concerned due process of law claims challenging procedure in this case, while the earlier, March 20, 2000 decision concerned equal protection and Guarantee Clause claims challenging the constitutionality of apportionments. It is also abstract because, as shown in the Petition, granting the motion would not have resulted in granting any injunction–it wouldn't even have made such a grant more likely than not. The

Respondent's abstract correlations cannot satisfy 28 U.S.C. § 1253, defines the conditions for direct appeal to this Court in clear and concrete terms.

Respondent cites eleven cases (Opp. at 8 & n.4) in which, he says, this Court "has already rejected" arguments "similar" to Petitioners' arguments. In fact, *none* of those cases constitute rejections of arguments "similar" to Petitioners' arguments. In all the cited cases, the three-judge district courts had dismissed the plaintiffs' complaints–*i.e.*, had not denied any Rule 60(b) motions (or even denied motions for reconsideration)–and the dismissals were *on the merits*. *See Shaw v. Reno*, 509 U.S. 630, 637-38 (1993); *Brown v. Thompson*, 462 U.S. 835, 841 (1983); *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 430 (1977); *Carter v. Stanton*, 405 U.S. 669, 670 (1972); *Lynch v. Household Finance Corp*, 405 U.S. 538, 541 n.5 (1972); *see also Lefkovits v. State Bd. of Elections*, 424 U.S. 901 (1976), affirming 400 F.Supp. 1005, 1005-16 (N.D. Ill. 1975) (three judge court); *Fincher v. Scott*, 411 U.S. 961 (1973), affirming 352 F.Supp. 117, 117-20 (M.D.N.C. 1972); *Beacham v. Braterman*, 396 U.S. 12 (1969), affirming 300 F.Supp. 182, 182-84 (S.D.Fla. 1969); *Sullivan v. Alabama State Bar*, 394 U.S. 812 (1969), affirming 295 F.Supp. 1216, 1222 (M.D.Ala. 1969); *Shames v. Nebraska*, 323 F.Supp. 1321, 1336 (D.Neb. 1971), *aff'd*, 408 U.S. 901 (1972). Thus, in all these cases, dismissal necessarily entailed "denying all *relief* sought" in the complaints, *Lynch, supra*, 405 U.S. at 451 n.5 (emphasis added), which included injunctions, so appeal was properly taken to the Supreme Court.

In both *Lynch* and in *Oldroyd v. Kugler*, 461 F.2d 535 (3d Cir. 1972), the order appealed from did not "explicitly deny[] injunctions," *id.* at 539, but the court properly noted that this was not "controlling," since "dismissal of the suit *on the merits* is sufficient to effect a judgment appealable to the Supreme Court under 28 U.S.C. § 1253." *Id.* (emphasis added; footnote omitted). The same result explains the appeal in *Lynch, supra*, because dismissal on the merits includes dismissal of the relief–injunctions–sought. It might also be noted that the court of appeals in *Oldroyd* proceeded to

address appellant's arguments that the three-judge district court erred in denying declaratory relief on the grounds that appellants/plaintiffs had not presented a "substantial federal question." The court of appeals concluded that the three-judge district court was in error in this finding, *id.* at 539-40, so the court of appeals was fully competent to address even the constitutional claims presented in the first instance in the case, so long as that process was not a review of a grant or denial of an injunction.

Conversely, the decision giving rise to the appeal underlying the instant Petition was *not* on–and did not address–the merits of Petitioners/Plaintiffs' constitutional claims which lodged their case before a three-judge district court in the first place.[1] It was a decision on separate claims which did not concern apportionments of representation and it did not entail decision on any demand for injunctions. The only "relief" at issue in Petitioners' Rule 60(b) motion was whether the judgment entered on March 20, 2000 would continue to hang over Petitioners' heads (and this relief hung upon Petitioners' claims to due process of law, not on equal protection or on the Guarantee Clause of the Constitution).

Thus, Respondent errs in saying that, "[f]or the same reasons that this Court had jurisdiction over" Petitioner's appeal in year 2000, "this Court–and not the court of appeals–also had jurisdiction over the appeal from denial of petitioner's Rule 60(b) motion" (Opp. at 8). The order appealed from in 2000 was an order dismissing Petitioners' *claims* challenging the constitutionality of present apportionments (*see* App. H). Conversely, the order underlying the instant appeal/Petition did not dismiss any *claims* nor, hence, requests for injunctions *based upon* those claims. The order underlying the instant appeal/Petition

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[1] Respondent makes a stern point that Petitioners "do not dispute" that this action was properly before a three-judge district court (Opp. at 6-7). Indeed, *Petitioners* applied for such a court (*see* App. F) and Respondent *opposed* that application (*see* Record), his counsel *denying* the very fact on which Respondent now hangs his hat. So much for consistent assertion of the law.

denied Petitioners' request for *relief from a judgment*, period. Had the request been granted, no injunction would have followed. Had the request been granted, Petitioners might have sought to amend their Complaint before proceeding to *delete* their requests for injunctions. There is no telling *what* would or could have followed any other judgment on Petitioners' Rule 60(b) motion.

Likewise, Petitioners' Rule 60(b) motion was not a motion to "reconsider" or readdress the merits of Petitioners' claims or arguments as to the constitutionality of apportionments of representation. The merits of those claims were simply not "on the table" in the Rule 60(b) motion, nor could they be. So denial of the Rule 60(b) motion can not be taken as re-denial of something already and independently "denied."

By way of comparison, one might anticipate a situation in which a person who should have been but was not drawn into an apportionment suit finds herself bound by some aspect of judgment in that suit (whatever it is), so she might seek relief from the judgment, *not* so she might pursue the same relief already decided but to seek entirely different relief. How could denying her motion amount to denying relief she is not seeking? How could granting her motion amount to granting relief which she has not applied for yet? The only "relief" at issue in her motion is her "relief" from the earlier judgment.

Finally, if Respondent's assertions were credible, almost *no* decision of a three-judge district court would not be directly appealable to this Court, since the relief sought in any case is placed at stake *abstractly* in almost *every* possible decision taken during the course of litigation. A decision limiting evidence can make it impossible for a plaintiff to prevail, so could amount to premature "denial" of an injunction. A converse decision barring certain defenses or taking judicial notice of certain facts might mean a defendant's goose is inevitably to be cooked, so he could appeal against this premature "grant" of injunctions.

Shall this Court open the door to *any* appeal, simply because the aggrieved party can say that, in the abstract,

looking down the line from the decision at issue, an injunction may or may not be granted or denied and be, therefore, abstractly traceable back to the decision appealed from? No; a far wiser course is to stick to the Court's settled jurisprudence and construe 28 U.S.C.§ 1253 to apply *only* to decisions which actually and/or necessarily by *direct* effect grant or deny injunctions. *See Shames*, *supra*, 323 F.Supp. at 1336 n.22 (construing *Goldstein v. Cox*, 396 U.S. 471 (1968)).

In the instant case, as a matter of fact, the decision giving rise to the appeal underlying this Petition neither granted nor denied any injunction. Therefore, 28 U.S.C. § 1253 does not confer appellate jurisdiction on this Court and the court of appeal has jurisdiction under 28 U.S.C. § 1291.

Regarding Question Two:

The essence of Respondent's argument on the second question before the Court is that, if the court of appeals lacked jurisdiction over this appeal, it need not have transferred the appeal to this Court under 28 U.S.C. § 1631 because it was not "in the interest of justice." It's not exactly clear, however, *why* Respondent thinks it's not "in the interest of justice" that Petitioners' appeal be reviewed.

On one hand, Respondent seems to suggest that the fundamental issue in the underlying appeal has already been decided by this Court (Opp. at 9-10). This suggestion is based on the procedural history of the case and it overlooks one clear fact (a fact which Respondent himself has never refuted) and one apparent problem: the merits of this case have never been addressed on the record and this Court's summary orders in 2000 in the earlier appeal are not as clear in their scope and meaning as Respondent suggests.

Insofar as Petitioners' did refer to this fact in their original appeal from the three-judge district court's March 20, 2000 judgment, this Court's decisions affirming that judgment and denying Petitioners' (then, Appellants') motion to rehear (reconsider) are not completely clear. As Petitioners have previously argued, it appears that this Court only decided whether to affirm the March 20, 2000 judgment of the three-

judge district court, and nothing more. But this then leaves undecided Petitioners' due process arguments at issue in their Rule 60(b) motion. In the end, only this Court can say for sure what it intended.

Did this Court address Petitioners' arguments that their claims, arguments, and evidence were wholly ignored and that their case was decided on the basis of antithetical claims and arguments presented in a separate case? Did this Court decide that it was *not* a violation of due process for Petitioners' claims to be dismissed because the claims in *another* case were defective? Did this Court decide that Petitioners were *not* entitled to evaluation of *their own*, actual claims, arguments, and evidence? Or did this Court decide that Petitioners were *not* entitled to due process of law?

If the answers to the questions in the previous paragraph are affirmative, then perhaps the issue in the underlying appeal *has* been addressed. But if the answers are not in the affirmative, then it *has not.*

Respondent also provides another suggestion, wholly independent of the first, as to why transfer of the appeal might not be appropriate. He suggests that this Court should "take a peek at the merits" of this case (Opp. at 10, quoting *Phillips v. Seiter*, 173 F.3d 609, 610-11 (7th Cir. 1999)), whereupon it will find that Petitioners "lack standing" to seek the relief they seek and that their equal protection and Guarantee Clause claims "lack merit."

This suggestion fails, however, because Respondent has failed to show that his premises are accurate. Instead, he proffers absurd and unsupportable "facts" of the case.

For instance, in his Statement [of facts], Respondent asserts that Petitioners' equal protection claim was that the Constitution requires Congress "either to grant statehood to the District of Columbia or to retrocede it to an existing State" (Opp. at 2). Nothing in the Record cited by Respondent supports such a ludicrous claim and the plain language of the Complaint (App. E) belies Respondent's distortions.

Petitioners' equal protection claim was nothing more than the garden variety claim that the government must treat

Petitioners in substantially the same manner as it has treated all other people who are or ever were under an identical or substantively identical power of that government, or show cause why any differential treatment is either mandated under law or is a necessary and unavoidable consequence of a compelling governmental interest (*see* App. E at ¶¶ 66-69 and "relief" section at ¶¶ A.1 & B.1-2; *see also* App. F at 3 & 5-6). Neither "statehood" nor "retrocession" were or could be elements or aspects of this claim.

For further instance, Respondent offers an argument concerning relief sought against Respondent, referring to an injunction requiring the President "to perform a non-ministerial task." (Opp. at 10 n.6). But nowhere in Petitioners' Complaint is there a request for an injunction that the President *do anything*. The only injunction sought against the President is *prohitory*–that he *not do* certain things (*see* App. E, "relief" section at ¶¶ C.1a-1b (the President "shall not" take certain action); *see also* App. F at 2).[2]

We shouldn't mince words; Respondents' assertions are merely tactical ploys to paint Petitioners as political outcasts or nutcases who don't *deserve* a fair hearing in court. How is justice served by this situation? What "justice" results from erasing a case? What justice results from avoiding addressing sound legal claims? The answer is "none."

The net fact is that Plaintiffs have presented justiciable claims and demanded only negative or prohibitory injunctions (*see* App. F), so their case is not a "sure loser" in any court

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[2] There's no authority for the proposition that the President is above the law and may do whatever he wishes without fear of judicial restraint or prohibition, when what he does violates the Constitution, so there is no known authority for the proposition that a court may not issue a *prohibitory* injunction to prohibit the President from enforcing an unconstitutional act or from doing something which violates the Constitution. For the purposes of this litigation, moreover, Petitioners would hypothesize that no court could tell the President to *do* anything, even if only "ministerial," *see, e.g., Franklin v. Massachusetts*, 505 U.S. 788, 824-27 (1992) (Scalia, J., concurring), but such an injunction is irrelevant to this case.

which is willing to grapple with the claims, arguments, and evidence presented, and since it's not a "sure loser," the claims at issue here should be reviewed, *somewhere*. *See Phillips, supra*, 173 F.3d at 611; *see also In re Dep't of Energy Stripper Well Litig.*, 206 F.3d 1345, 1354 (10th Cir.), *cert. denied*, 531 U.S. 924 (2000) (transfer under 28 U.S.C. § 1631 denied because the court to which movants sought transfer had previously signified its intention to "finally dispose of" the claims to be transferred *and* movants had "ample opportunity to pursue" their claims in "the proper forum"–neither of which condition pertains to the instant appeal).

The record in this case contains adequate and unrefuted evidence that Petitioners' original claims, arguments, and evidence were wholly *ignored* by the three-judge district court (*see* App. J), and the record contains adequate and unrefuted evidence supporting Petitioners' original claims and arguments are substantial and present pressing federal constitutional challenges to existing apportionments (*see* App. F). Therefore, upon a fair review of that record, *see Campbell v. Office of pers. Mgmt.*, 694 F.2d 305, 309 n.6 (3d Cir. 1982), it cannot be said that Petitioners' "could not prevail" on their Rule 60(b) motion–which is actually at issue in this Petition (nor could it be said that they could not prevail in their original case–which is not at issue in this Petition). Therefore, if the court of appeals indeed *lacks* jurisdiction over the appeal underlying the present Petition, the appeal should be *transferred* to this Court under 28 U.S.C. § 1631.

CONCLUSION

For the reasons stated above and in the Petition for Writ of Certiorari, it was an error for the court of appeals below to dismiss Petitioners' appeal. The Court should issue a Writ of Certiorari, summarily reverse the court of appeals, and remand the matter for reinstatement of Petitioners' appeal from the decision of the district court denying Petitioners' Rule 60(b) motion.

In the alternative, if the court of appeals below lacks jurisdiction over Petitioners' appeal from the decision of the

district court denying Petitioners' Rule 60(b) motion, this case should be sent back to the court of appeals with instructions that Petitioners' appeal be transferred to *this* Court under 28 U.S.C. § 1631 and 28 U.S.C. § 1253.

Respectfully submitted,
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